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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 723

KURT G. W. LUDECKE, PETITIONER,

vs.

**W. FRANK WATKINS, AS DISTRICT DIRECTOR OF
IMMIGRATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 31, 1947.

CERTIORARI GRANTED APRIL 5, 1948.



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JUDG & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 8, 1948.



[fol. a]

**IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK**

Civil 38-293

UNITED STATES OF AMERICA, ex rel.

KURT G. W. LUDECKE, Relator-Appellant,
against

W. FRANK WATKINS, as District Director of Immigration
and Naturalization of the United States for the District
of New York, or such person, if any, as may have the said
Kurt G. W. Ludecke, in custody, Respondent-Appellee

[fol. 1] PETITION FOR WRIT OF HABEAS CORPUS

To United States District Court,
Southern District of New York:

The Petition of Kurt G. W. Ludecke shows that Kurt G. W. Ludecke is illegally imprisoned and restrained in his liberty by Mr. W. F. Watkins, Director of Immigration and Naturalization Service District of New York, or such other person, if any, who has him in custody, at this time at Ellis Island in the Harbor of New York; and that he is not committed or detained by virtue of any process or mandate issued by any Court of the United States, or by any Judge thereof; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree or final order. The cause or pretence of the imprisonment or restraint, according to the best of the knowledge and belief of your Petitioner, is a removal Order of 1-18-46, signed by the Attorney General, because "upon consideration of the evidence presented before the Alien Enemy Hearing Board on 1-16-42, and before the Repatriation Hearing Board on 12-17-45, [the Attorney General deemed] the said alien enemy to be dangerous to the public peace and safety of the United States because he has adhered

to the [Nazi] government . . . or to the principles thereof;"

However, as a matter of fact and of record, your Petitioner is not only Not dangerous to the public peace and safety of the United States, because he did not adhere to the said government or to the principles thereof, but quite on the contrary is an honest legally admitted resident who already long before Pearl Harbor was a true American at heart and in spirit. In Court together with his body he will produce conclusive evidence showing that (1) the Department of Justice did not produce any evidence whatever in said hearings showing that he has adhered to the Nazi Government or to the principles thereof; (2) the charges raised in said hearings are incompetent, irrelevant and immaterial; (3) the entire procedure adopted by the Department of Justice in this matter is un-American and dishonest, arbitrary and illegal, jeopardizing the prestige of American justice by flagrant and cynical violations of both the Constitution and Natural Law itself, as well as the Alien Enemy Act of 1798, authorizing the constraint of alien enemies; (4) it is guilty of fraud and criminal abuse of power in order to bring about under the cloak of legality the illegal deportation of a legally admitted decent resident alien eligible for citizenship; wherefore your Petitioner prays that a writ of habeas corpus issued direct to Mr. W. F. Watkins, Director of Immigration and Naturalization Service District of New York, or such other person, if any, who may have Kurt G. W. Ludecke in custody, commanding him to produce the said Kurt G. W. Ludecke before a term of this Court, so that the Court may inquire into the validity of his detention and removal.

Kurt G. W. Ludecke, Petitioner,

Dated the 14 day of October, 1946.

STATE OF NEW YORK,
County of New York:

Kurt G. W. Ludecke, the Petitioner above named, being duly sworn, doth depose and say, that the facts set forth in the above petition, subscribed by him are true.

Sworn to before me this 14 day of October, 1946.

Alice C. Palmer, Notary Public, New York County
Clerk's No. 271, Register No. 547. Commission
expires March 30, 1947. P. 7.

[fol. 2] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS

I, R. A. Vielhaber, Assistant to the District Counsel of the New York District of Immigration and Naturalization Service, Department of Justice, in my official capacity and pursuant to authorization, in behalf of the respondent hereby certify and make the following return to the writ of habeas corpus in the above-entitled matter:

1. The relator, Kurt G. W. Ludecke, is being held in custody as an alien enemy pursuant to the provisions of Title 50, United States Code, Section 21, and the Proclamation of the President, No. 2526, dated December 8, 1941.

2. The relator is a native, citizen, denizen, or subject of Germany.

3. The relator was born in Berlin, Germany, on February 5, 1890.

4. The relator has been ordered removed from the United States by an order of the Attorney General dated January 18, 1946, pursuant to proclamation of the President, No. 2655, dated July 14, 1945.

5. A copy of the order of removal is annexed hereto and made a part hereof:

Wherefore it is prayed that the Writ of Habeas Corpus herein be dismissed and the relator remanded to the custody of the District Director, Immigration and Naturalization Service, Department of Justice.

Dated: New York, N. Y., October 28, 1946.

R. A. Vielhaber.

[fol. 3] In the Matter of KURT GEORGE WILHELM LUDECKE,
Alien Enemy.

ORDER OF REMOVAL

Whereas, Kurt George Wilhelm Ludecke is a German alien enemy over the age of fourteen years who has heretofore been interned by order of the Attorney General dated February 9, 1942; and

Whereas, the said alien enemy was, at his request, accorded a full hearing before a Repatriation Hearing Board on the issue of his removal from the United States; and

Whereas, upon consideration of the evidence presented before the Alien Enemy Hearing Board on January 16, 1942, and before the Repatriation Hearing Board on December 17, 1945, I deem the said alien enemy to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principle thereof; Now, Therefore,

It is Ordered that the said alien enemy depart from the United States within thirty days after notification of this order; and

It is Further Ordered that, in the event the said alien enemy fails or neglects to depart from the United States within the said thirty days, the Commissioner of Immigration and Naturalization is directed to provide for the alien's removal to Germany.

Tom C. Clark, Attorney General.

Dated: Washington, D. C., Jan. 18, 1946.

[fol. 4] IN UNITED STATES DISTRICT COURT

SUMMARY OF RELATOR'S BRIEF

If it pleases the Court I make a brief statement—a summary of the facts, my view and attitude. Please listen with an open mind.

At the beginning of Hitler's regime, early in 1933, without any process of law I was imprisoned to rot in Nazi concentration camps, simply because I had insisted on principles, decency and law. I escaped to save my life and returned to America where I was a legally admitted resident. Though the Nazi Ludecke was dead, I had to get the past off my chest. After writing "I Knew Hitler"—published by Scribners in 1937—I was ready for a new life and gradually developed a wider understanding and a deeper insight into the significance of things. But that did not save me from being arrested the day after Pearl Harbor and from being interned as a "potentially dangerous alien enemy". Ever since, for almost five years, I have been a

prisoner in American concentration camps and now am facing deportation which, under the circumstances, means more persecution, slave labor, maybe even death in Germany.

All this, nota bene, for no valid reason whatever, without a proper hearing in Court as demanded by the very law allegedly authorizing arbitrary procedure, namely by Section 23 of the Alien Enemy Act of 1798; moreover in flagrant violation of my constitutional rights and my natural rights given to all men, be they citizens, aliens, or alien enemies, by a source of law more fundamental than any party or majority or any human institution, as the Declaration of Independence proclaimed. For the right to liberty is secured by the writ of habeas corpus, but was not given by the Habeas Corpus Act. Thus spoke a competent American, Associate Justice Dore of the Appellate Division of the New York Supreme Court, in a remarkable speech made last March to the Association of the Bar of the City of N. Y., part of which appeared as "Human-Rights and the Law" in LIFE's last Independence Day Editorial reminding us that America is founded on Natural Law proclaimed in the Declaration. In "Human Rights and the Law" Justice Dore, as LIFE well says, "has gone straight to the heart of an old philosophical dispute: whether Law is simply what selfish and willful men choose to make it or whether Law can and must be derived from eternal principles of right and wrong."

Decisive is that *Natural Law, The Supreme Law*, has given these rights to all men, black or white, yellow or red, Gentiles or Jews, including alien enemies of course, may they be native Germans today, or communists or democrats from other lands tomorrow.

The Dept. of Justice is definitely in error in insisting on the fallacy that the Government exercising Plenary War Powers is within the law to deny these rights to alien enemies—by fiat branded and persecuted as "dangerous"—without due process of law. No doubt that constitutional and natural rights are valid in war and peace. This self-evident truth is also confirmed by the power of precedent. There is the famous habeas corpus case known as *Ex Parte Milligan*. The Opinion handed down by the Supreme Court in 1866 reads as follows:

"The Constitution of the United States is a law for rulers and people, *equally in war and peace*, and covers

with the shield of its protection *all classes of men, at [fol. 5] all times, and under all circumstances.* No doctrine involving more pernicious consequences was ever invented by the wit of man that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; . . ."

Furthermore, the war is over already 18 months, the Nazi State so completely and totally crushed, that today there is no German nation, no German Government, no German flag. Therefore, the argument that the United States is still at war with a non-existing Germany is mere false pretense for the exercise of arbitrary power in contravention of vested natural and constitutional rights; hence, the continuance of the exercise of such tyrannical powers is un-American and dishonest, illegal and a great threat to the American Way of Life compared to which any alleged danger from this Relator is infinitesimal.

I wish to emphasize too that it is definitely not true what is alleged in the removal Order signed by the Attorney General, namely, that I am deemed "dangerous" on the *basis of evidence* considered at the farcical hearings granted alien enemies to serve as window-dressing for the public. The truth is that no evidence whatever was produced. And it is a matter of record that never there were any specific charges and that the points raised at said hearings were absurd, incompetent, irrelevant, and immaterial.

As long as Courts are open and unhampered with within the confines of the U. S. where Relator resides, I am entitled to a proper hearing before a judicial tribunal—as provided under Section 23 of the A. E. Act—to determine the question of whether or not I am a dangerous alien enemy. By its very language, said Section 23 confers upon the Courts having criminal jurisdiction the sole authority to cause the alien enemy to be conveyed before a Court, to be given *full examination* and hearing on a complaint, and after *sufficient cause* appearing to be removed. And said Section does not merely say that it confers jurisdiction in these matters upon the Courts, but uses the words "it shall be their duty". By any rule of construction or reasonable interpretation of this language, it must be evident that

under Section 21 of said Act the President was given the right to make certain proclamations in time of war, but not the right to make law authorizing him to detain and deport alien enemies, that is legally admitted residents, without due process of law. After such proclamation is made, the enforcement thereof is given exclusively to the several courts of the United States where it rightfully belongs.

In his report on the Nuremburg trial Justice Jackson rightly emphasizes that more important than the personal fate of the Nazi leaders are the principles, that these principles, now backed by the power of precedent, constitute the basic charter of international law, and that this law applies not only to the Nazi leaders but to all men everywhere; and that it is incumbent upon all victors to review their own politics and practices in the light of the new law. And the recent official note of the State Department to the Yugoslav Foreign Office regarding imprisoned Americans says:

"It appears that these individuals, who have been convicted of no crime whatever, have been confined in camps under the administration of the Yugoslav Government;" etc., etc., and continues, "The United States Government states its abhorrence and condemnation of the practices described above. They are violations of established principles of international [fol. 6] law governing the protection of foreign subjects, constituting involuntary or forced labor in denial of the *natural rights of human beings* and possessing no features distinguishable from slave labor."

In the light of the violations of these very rights of alien residents in the United States by the very same Government, I ask How is it possible that a Government loudly condemning such violations *abroad* and supporting the principles of right and justice in certain parts of the world, at the same time insists to *deny them at home*?

Once more I point to the Declaration of Independence which Lincoln said is "an abstract truth—*applicable to all men and all times*." And to the words spoken by the great American prophet, Edward Bellamy, the author of "Looking Backward" and "Equality": "The lawyers had made a Constitution of the United States, but the true American Constitution—the one written on the people's hearts—had

always remained the immortal Declaration with its assertion of the unalienable equality of all men."

We are at the parting of the ways. The time has come for the American Courts as well as for the American people to decide once and for all whether or not the Declaration is valid and all that implies, whether or not it is a living reality or merely an occasion for fire-cracker celebrations of "glittering generalities" as cynics say.

In conclusion, I solemnly declare that I am an honest man of good will believing in the Right Life and striving to live up to it, and that I fight this fight not for the sake of my unimportant self, but for fundamental principles at stake. Therefore, for the benefit of all concerned, I have prepared a Brief dealing with all the facts and issues involved, so that the Court may have all the information needed to reach a just decision.

With your permission, Your Honor, I herewith respectfully submit the Brief which I believe deserves and compels the most active consideration of this Court, for the sake of Justice and the Honor of the United States.

Thank you!

Above was submitted with the Brief to the Court (United States District Court, Southern District of New York); on October 29, 1946.

[fol.]

FOR PERSONAL ATTENTION

REPORT

made for the Attorney General Tom C. Clark to supplement attached Statement of December 17, 1945, by Kurt G. W. Ludecke, Ellis Island ORF, New York 4, N. Y., January 16, 1946

On December 17, 1945, I had my hearing at Ellis Island before the Repatriation Hearing Board consisting of Mr. Edward J. Ennis, Mr. John Burling, and Mr. W. F. Kelly. Attached Statement of which I left a copy with the Board for the record speaks for itself, however would be incomplete without supplementing it with the report of the failure of the Board to produce the evidence, namely, "sufficient cause" that would justify my removal out of the territory of the United States. For the very law which is

supposed to be the "legal" basis for my removal, the Alien Enemy Act of 1798 (50 U. S. C. 21-24), explicitly states in § 23 that "the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized . . . to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing . . . and sufficient cause appearing, to order such alien to be removed out of the territory of the United States . . . or to be otherwise restrained . . . and to imprison, or otherwise secure such alien; until the order which may be so made shall be performed."

In the light of this Act it is evident that my removal would be a definite violation of American law, just as my internment during and after the war is unlawful and therefore is an abuse of power, because there never existed any evidence, that is "sufficient cause," to justify even my detention for later removal—a fact which could have been easily established, if a "full examination" of my case had been made—"full" here apparently meaning an honest and thorough examination. However, such a "full" examination has not been made.

Needless to emphasize that neither the Alien Enemy Hearing Board considering the question of my internment on January 16, 1942, nor above mentioned Repatriation Hearing Board considering the question of my removal, represent a "court, judge, or justice" as is required by law. In this connection, special attention must be drawn also to the fact that my very arrest was illegal, because it took place on December 8, 1941, that is 3 days before Hitler's Declaration of War against the United States—a colossal blunder which no American, not even the late President Roosevelt, could have foreseen—"illegal" in the light of the Alien Enemy Act itself which explicitly states in § 21 that only in case of war, i.e. "declared war," alien enemies "shall be liable to be apprehended, restrained, secured, and removed as alien enemies."

At the beginning of my hearing on December 17, 1945, I made the following declaration: "Before making a statement on my behalf may I emphasize that after an internment of more than four years I still have been unable to learn Why—that is the specific charge on which, first, I was supposed to be a "potentially" dangerous alien

enemy subject to internment, and now am suddenly deemed to be "actually" dangerous subject to removal because of my alleged adherence to an already liquidated government branded as a government of "murderers and gangsters" or to its principles branded as "satanic principles"—again without telling me any specific reason that would justify such a serious indictment and decision."

"Therefore, I herewith respectfully request that you tell me now on which ground the charge is based, and on which specific evidence the verdict has been made."

[fol. 8] Here is what in the opinion of Mr. Ennis (or whatever other responsible person) presents the "evidence" that justified my internment and now calls for my removal as a "dangerous" alien enemy—a man with a clean record who has been legally admitted in this country in 1927, who has scrupulously obeyed the law of the land, who has leaned backward to explain himself without reservation to American officials whenever possible.

1) My asking the German consul Wiedemann about my legal status.

2) Passages from a copy of a letter of December 2, 1941, written by me to Claude Bragdon, Shelton Hotel, New York City, and apparently containing controversial remarks about Roosevelt and Hitler.

3) The answer I had given at my hearing before the Alien Enemy Hearing Board at Chicago on January 16, 1942, when asked which side I wished to win the war. (I said I quote Gandhi who replied "neither side" to the same question put to him some days ago.)

4) The denial of my petition for naturalization on December 18, 1939.

5) The question of my still being a Nazi in spite of my open break with Hitler and the Nazi party after my escape from a Nazi concentration camp early in 1934, in spite of my condemnation and devastating account of Hitler and his regime in my book "I Knew Hitler" published by Charles Scribner's Sons in 1937, and in spite of my repeated declaration and easily verified fact that already since 1939 I have adopted the philosophy and morality of Edward Bellamy, whose synthesis and program offer a workable application of Jesus Christ and of the abstract truth pro-

claimed in the Declaration of Independence in practical terms.

Before I proceed to deal with the above "charges" and points of "evidence" one by one I wish to emphasize that I object to each as incompetent, irrelevant, and immaterial, and that in the light of the very indictment itself, namely, the official Notice of my removal of July 31, 1945, in which the Department of Justice definitely committed itself by explicitly stating:

"1. By proclamation of July 14, 1945, the President of the United States, acting under the authority of the Alien Enemy Act of 1798 (50 U. S. C. 21-24) has prescribed

"All alien enemies who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States"

"2. Pursuant to the above proclamation and based upon the evidence considered at [my] earlier alien enemy hearing , it has been determined that [I] should be removed"

Already at this point it is evident, that it is absurd to consider me "dangerous" on the ground of above specified charges, especially in view of the fact that the Hitler regime and the Nazi party as the physical organization to promote and apply Nazi principles whatever those may be are crushed beyond the hope of recovery, not to speak of the equally obvious fact that the Nazi Government or Nazi principles here in this country never at any time have been an *actual* danger to the peace and safety of the United States, and certainly now that the war is over, Hitler and the Nazi machine smashed beyond repair, cannot possibly — deemed to be even a *potential* danger from any point of view.

[fol. 9] Moreover, the War Division of the Department of Justice is stating a falsehood in speaking of "the evidence considered at my earlier hearing" (a fact already

emphasized in enclosed statement) because I have heard of the charges above mentioned only now for the first time on Dec. 17, 1945.

Also, in view of these facts the wording of § 3 of the official Notice is most significant, namely, it says that a hearing will give me "an opportunity to appear in person and to present evidence to show that [I am] not dangerous to the public peace and safety of the United States because of [my] adherence to an enemy government or to the principles thereof"—just as though my adherence to a government branded a government of murderers or to its satanic principles were an already established fact.

Now, to return to the specific charges presented as "evidence."

1) Considering the rumor of my denaturalization after the banning of "I Knew Hitler" in Germany in 1938, and considering the denial of my petition for naturalization in the United States in 1939, my inquiry for my legal status is a natural and logical step to take, because in case of the loss of my German citizenship, I would have been staatenlos—stateless, certainly an uneviable position, especially in these times.

2) Said letter to Claude Bragdon, written *before* Pearl Harbor by the way, is a private letter addressed to a distinguished and renowned American, therefore decidedly a matter that is nobody's business but our own, particularly in view of the "Four Freedoms" and all that implies. (Not wishing to discuss controversial remarks taken out of the context I asked for the whole letter to refresh my memory as to its real meaning. However, significantly my reasonable request was denied.)

3) I quoted Gandhi's reply, first, I thought it a wise answer for reasons too long to explain now, and second, certainly Gandhi could not be accused or even suspected of being a Nazi or Nazi sympathizer. Anyway, a strange point of "evidence"—particularly in view of the "Four Freedoms" and all that implies.

4) It is a matter of record with the U. S. A. District Court of Michigan Southern Division at Detroit that the reason for denial of my petition on December 18, 1939, was *not* because of an alleged dangerousness because of my alleged

adherence to a gangster government or to its satanic principles, but because of "failure to prove attachment to the principles of the Constitution of the United States. With prejudice. Not to refile before five years from date." In other words, according to the verdict of a Federal Judge in a public court procedure I should have been able to refile my petition on December 18, 1944, and most probably would be an American citizen now. However, my application to refile a petition for naturalization properly submitted to the Nationality and Status Section of the I. & N. Service at New Orleans, La., was not taken into practical consideration because of my status of an interned alien enemy. Apart from the fact that the denial of my first petition at Detroit was "a flagrant miscarriage of justice" to quote a reporter of the Detroit Times—a fact I could easily prove if allowed to do so as already repeatedly stated in communications to Mr. Ennis and other American officials—said denial under no circumstances can serve as a point of evidence to justify my proposed removal as an alien enemy "dangerous to the peace and safety of the United States."

5) Am I still a Nazi?—At this point, I wish to state that I am well aware of the false pretense of the whole business, [fol. 10] for the gentlemen interested in my removal are not so stupid to believe themselves that I am "dangerous" in the sense presented for the record and the public. If nevertheless I choose to fight this miserable humbug, I am doing it also for the record and for a definite purpose which will become clearer as the days go by.

If Mr. Ennis or the person responsible for my internment and proposed removal would have made a "full examination" of my case as required by law, he could have convinced himself as early as 1942 that the Nazi Ludecke died many years ago, and that the new Ludecke is a true American in heart and in spirit ever since 1939, when I adopted Edward Bellamy's concept of Americanism, as well as his practical interpretation and application of the Declaration of Independence which is the foundation of what is called today American Democracy. However there does not exist an official definition nor a traditional and generally accepted interpretation of the real meaning of both: The Declaration of Independence and American Democracy. This deplorable situation partly explains the conflicting views and

the confusion in the minds of the people regarding these concepts, which in turn make for confusion and conflict in practical life.

Not a particle of evidence was produced at my hearing showing that I am still a Nazi, especially a Nazi of the kind to make me "dangerous" and therefore subject to removal—for the simple reason that there is no evidence that I am still a Nazi or ever was a Nazi "dangerous" in the sense of the indictment.

For your information, I may quote a passage from a Statement of September 13, 1944, made at the instance of Mr. Raymond E. Bunker, officer in charge of the A. D. Station at Algiers, La., and forwarded to Mr. Ennis, which reads as follows:

"... it is a matter of record that I have never been a "Nazi" in the sense the Nazi is publicly interpreted, represented, understood and indicted in America ever since Hitler's rise to power in 1933, but especially since Pearl Harbor when war propaganda and lying from all sides intensified hate and confusion throughout the world, so that the "Nazi", for instance, in the minds of most Americans is identical with the lowest beast and the very devil himself.

"It also is a matter of record that ever since I became a member of the Nazi party I specialized in foreign politics, therefore had nothing to do with the internal development and domestic policies of the Nazi party. Nor did I have any influence whatever on the moulding of Nazi thought and the shaping of the Nazi system, for the simple reason that except for short visits I was again continuously outside of Germany ever since the spring of 1923 until March 10, 1933, shortly after Hitler became Chancellor on January 30, 1933. And of the three-hundred and fifty-five days I spent in Germany in 1933-34, I rotted two hundred and forty-five days in prisons and in concentration camps, because I consciously and fearlessly opposed certain developments and personalities that jeopardized the very future of the German revolution. . . . Thus, it must be emphasized that I have neither part nor lot in nor in the slightest responsibility for whatever happened in Germany, nor whatever Hitler, the Hitler regime, and the party may be guilty of since the beginning of their rule, for the simple

reason that I have been a prisoner in Germany shortly after my arrival in Germany in 1933, and that I have not been in Germany or Europe ever since my escape from a Nazi concentration camp on March 1, 1934.

[fol. 11] "In this connection, I may quote a significant passage from 'Failure of a Mission' by Sir Nevile Henderson, the last British ambassador in Berlin, who declared that 'it would be *utterly unjust* not to realize that great numbers of those who *adhered* to and worked for Hitler and the Nazi regime were *honest* idealists, whose sole aim was to serve Germany, to improve the lot of her people, and to add to their happiness. Hitler himself may well have been such an idealist at the start. Later he undoubtedly used this idealism as a cloak to justify the continued existence of the regime and of its leaders.' (From the World's Greatest Books, p. 861, Wm. Wise & Co., New York, 1942.)"

"It is interesting that an Englishman and distinguished statesman who certainly can not be accused of any pro-Nazi tendencies nor any subversive activities made such a statement as late as 1940, when Great Britain and Germany were at war already for many months. In contrast, I may emphasize that as a matter of fact I personally worked for Hitler and the Nazi party only up to May of 1933, and ever since uncompromisingly opposed the 'legitimate' Nazi regime."

A regime, I am adding today, which was properly recognized by the American Government from 1933 to 1939.

It would appear logical and sensible, in fact the obvious thing to do, to read at least the autobiography of a man dealing with the very matter of which he is accused before indicting and condemning him. The hearing revealed, however, that neither Mr. Ennis nor Mr. Burling—contrary to the "full examination" exacted by law—have thought it necessary to read "I Knew Hitler"—which is not only a most revealing human document, but also a most important piece of evidence, in my favor, to be sure, because from beginning to end it is full of biting criticism, exposure, and condemnation of Hitler and his chiefs, of Nazi ways and proceedings, often in a language so strong that in the English edition by Jarrolds, London, such passages are modified or omitted entirely because of the severe libel laws in England. Otherwise these gentlemen would have learned of a letter I wrote to Hitler after my escape from Germany

and arrival at Geneva in April of 1934. (see pp. 752 and 753.) The essential parts of said letter are reproduced in paraphrased form in the book. I quote here only the following:

"Regrettably I could no longer call him my 'Führer', for I could no longer profess adherence to a party which was willing to treat an innocent and faithful member so shamefully, depriving him of his liberty for eight months without legal procedure and without a hearing, brutally and ruthlessly abandoning him to spiritual and physical destruction."

"... that I was ready to accept the personal injustice for the good of my soul, and to let it go at that. But there was a principle at stake whose importance transcended my unimportant self. . . . Hitler himself, I reminded him, had told a leader's conference in October 1933: 'He who courageously demands his right, in the end will get his right.' And in another speech he had said that he would retreat 'only before reason.' In this case reason was on my side. He knew well that the calm admission of error was not a sign of weakness but of strength—a proof of human greatness. And if this last attempt to obtain my right should also be ignored, I would have to act at my discretion, with only my conscience as my guide."

I even said in the letter but did not mention it in the book that in that case "I could not consider myself a German [fol. 12] any longer." (A copy of said letter still is in my possession, as well as the receipts issued by the Geneva post office which sent copies of the letter by registered mail to the people named in the book on page 753.)

There is a curious analogy between the situation of today and the one referred to above. For the sake of justice and the honor of the United States, I sincerely hope that American justice will be more honest than Nazi justice.

One member of the board sought to belittle the significance of the blurb of my book when I pointed to the following passage:

"A unique human document of historic value . . . the story of the progressive disillusionment of a man who once revered Adolf Hitler as his hero, but sees him now as an ice-cold, unscrupulous opportunist whose egomania has distorted him into a Messianic fraud."

Despite the author's justification for bias, his account strives for honesty and detachment, and succeeds admirably in painting a living, breathing portrait."

Probably, the gentleman did not realize that behind the blurb of a book stands the reputation and the prestige of the publisher, in this case of that fine old publishing house bearing the name Charles Scribner's Sons, one of the very best and most reliable in the United States if not the world, which attained the century mark the other day.

Of the many appraisals and reviews recommending my book I select one, because it emphasizes something that I value most, the opening paragraph of a letter of December 20, 1937, by Vernon McKenzie, dean of the School of Journalism of the University at Seattle, which reads as follows:

"I got hold of your book 'I Knew Hitler' as soon as I could after it came out, as I knew I would find it of intense interest. My expectation was fully borne out and I found it one of the most thrilling, dramatic, and humanly *honest* books that I have ever read."

Finally, for the record, I draw attention to enclosed brief read by me in court and left as evidence on December 18, 1939. Though it did not move the Judge to make an honest decision regarding my petition for naturalization, it nevertheless is perhaps the most revealing document about my own self. It explains the inner change from the Nazi Ludecke who is dead to the new Ludecke who according to the enclosed affidavits of three trustworthy and distinguished Americans with mature judgment "is in every respect worthy of American citizenship and in no way dangerous to the public peace and safety of the United States."

As evidence that I did not suddenly discover Edward Bellamy *after* my arrest for reasons of expediency, but had adopted his philosophy long *before* my arrest, I quote from a significant bold-faced article "Ex-Nazi Loses Plea for U. S. Citizenship" in the Detroit Evening Times of December 19, 1939, page 7, saying:

"Judge Tuttle questioned Ludecke on recent speeches, asking:

'You are preaching in America that the Treaty of Versailles is unjust?'

'Many Americans say so,' Ludecke replied.

Praising the economic philosophy of the American writer Edward Bellamy, Ludecke referred to economic ills, saying:

'No one can tell me God ordained so much misery.'

Judge Tuttle interrupted:

'Do you have the idea there are people hungry in this country?

[fol. 13] Or that people are shivering in the streets? We have been freest of any nation of such evils for hundred years.'

Quoting President

'I quote the President,' Ludecke said 'who referred to the ill-fed, the ill-housed and the ill-clothed.

'if you call me a revolutionary because I believe Edward Bellamy was right, you condemn not me but Edward Bellamy, a native American and a noted philosopher.'"

I insist on mentioning Bellamy because my conversion to true American democracy and my understanding of the American Purpose was not caused by what I saw and experienced in the sham democracy of today, but by studying and appreciating the spiritual vision, the moral integrity, and the practical wisdom of Edward Bellamy whose incomparable work is the most penetrating and honest analysis of human society as it is, and the most comprehensive and logical, the most constructive and creative synthesis of human society as it should be—and will be some day, because it is the only way to build the Brotherhood of Man and the Fatherhood of God.

Therefore, because it is high time that especially the public servants learn what *true Americanism* really is, it is an absolute Must to "Read Bellamy! Once thoughtfully read and pondered, he is capable of giving the reader new eyes to see with, new ears to hear with, and a new mind and heart to understand and interpret this world in which we live."

In fact, the decisive question of What democracy really means is so acute that men even in the Department of Justice are cognizant of it, but obviously men not belonging to the Alien Enemy Control Unit. The "Federal Textbook On

Citizenship" published by the United States Department of Justice and the Immigration and Naturalization Service in 1943 admits in "Introduction to Citizenship Education"—A Teacher's Guide—that:

"... within our own land there is confusion as to what democracy really means, and more than one element which some Americans feel to be a vital part of true democracy is being decried by other groups of Americans.

"Thus it is not surprising if the noncitizen, perhaps of limited education and brought up in a different sort of environment, falters in developing an undying allegiance to democracy. He is torn by rival propagandas. He sees us idealizing his native land one year and turning upon her the next—or reviling his native land for years, then suddenly cheering her as an ally.

"Yesterday's friends are today's enemies, and it seems there is nothing stable, nothing man can tie to permanently. All this affects the noncitizen personally. He is bewildered by the rapidly changing attitudes his neighbors maintain toward him because of events far away. He finds no real solidarity of opinion as to what is democracy and what is not. Probably at no time in his life has anyone presented to him clearly and simply a full picture of the true concepts of democracy, or of the issues which face democratic people." (p. 33)

"... At no previous time have Americans searched so earnestly for the true meaning of the 'American Way.'" (p. 35)

"... Perhaps here is a problem for Americans to face, too: Would we fully admire a person who turned on the land of his birth and kept no lingering affection for it, who did not view with sorrow the hostilities between his old and new home? Would such a man be very likely to develop a great and lasting love for America?" (p. 32)

[fol. 14] In view of this admission by the Department of Justice itself, the Attorney General would do well to keep this in mind when considering the "recommendations of removal" coming from Mr. Ennis concerning men and women who are about as "dangerous" to dear old Uncle Sam as a gnat is to an eagle.

Summing up, the following may serve as a final illustration of the procedure and an indication of the level of my hearing, which I did my best to tolerate with courtesy and patience though it was hard at times not to be sarcastic.

Toward the end, Mr. Ennis—perhaps aware of the sorry show of “evidence”—suddenly with an eager glint in his eyes hurled at me the question “What was your reaction to President Roosevelt’s death?”

Needless to emphasize the significance of this performance of Mr. Ennis who—unable to produce the “evidence” of my dangerousness as requested by me and supposed to be a long established fact according to the official Notice of my removal—tries to establish now at the hearing the much needed evidence, and that with a question which so obviously is incompetent, irrelevant and immaterial, that a child could grasp it. Moreover, it allows a deep insight into the curious working of Mr. Ennis mind. If the “Führer-complex” of the Nazis is the wrong thing, if it is wrong to identify Hitler with the German people, is then the “Roosevelt-complex” of the democrats the right thing, and is it right to identify Roosevelt with the American people—in the sense, for instance, that somebody expressing delight with Roosevelt’s death more than ten months ago becomes “dangerous to the peace and safety of the United States?”

(To anticipate any misinterpretation or misunderstanding I may mention that I did not oblige Mr. Ennis by saying that I was pleased with President Roosevelt’s death, but said something else to suggest the pointlessness of his question.)

Enough is said to show that it would be a preposterous lie and criminal abuse of power to brand me with the stigma of deportation as a man “dangerous to the peace and safety of the United States.” If anything I might be considered dangerous to the peace and safety of hypocrites and liars. However, even that is false, for no longer am I a revolutionary activist because among other things I learned that first I must reform myself before I dare reform my fellow men, though I am ready any time to give from the little I know to those who still know less than I.

Far be it from me, however, to thrust my goodwill upon anybody and insist to stay on a community whose public servants of ill will seek to remove me by pitiful procedures and illegal means. Therefore, I propose that I leave voluntarily as a free man, not as a dangerous alien deportee,

at the earliest opportunity provided I shall be allowed sixty days to settle my affairs before sailing date.

Fundamentally, it matters not Where I live, for I can strive to live the right life and be of service where ever I am. Besides, it may well be a better thing to do the best I can while I can in the midst of a defeated people suffering in body and soul, than to be a futile and frustrated something in the midst of a triumphant people breathing the foul air of self-complacency, hypocrisy, and self-deceit.

[fol. 15] In conclusion, may I take the liberty to call your attention to the enclosed editorial "Concentration Camps in America" published in the Chicago Daily Tribune of December 29, 1945, which speaks for itself. There may follow more editorials and articles of the sort and not only in the Chicago Daily Tribune which will expose also the infamous treatment of legally admitted not only not "dangerous" but law-abiding decent people, so-called alien enemies, many of whom (including men of over sixty-five years of age) have to live under outrageous conditions in the pigsty of Ellis Island which is worse than a madhouse, and that after four years of internment practically for no other reason than that they are of German blood or for some asinine charge which would be laughed out of court anywhere in the United States, except New York perhaps.

Do you know that there are many who have had their hearing already in August of last year and still are in the dark about their removal or release? Do you realize the mental torturt of incertainty they are undergoing already for years? Do you realize that an alien internee is worse off than a regular criminal who is properly tried in open court, properly sentenced by a recognized judge, at once or within a few days, if found guilty by a regular jury, transferred to a definite prison, to a definite cell and a definite job, for a definite time? Whereas we are moved from place to place, often housed like cattle—under conditions that destroy our health, undermine our morale, and drive us crazy!! And never know what next!! And that in spite of the obvious fact that most of us are innocent and harmless?

Instead of tormenting and removing the innocent the Attorney General would do better to remove and call to account the guilty who prostitute the sacred cause of justice, disgrace the honor of the American people, and jeopardize the prestige of a misinformed President of a great nation. No less a person than State's Attorney Homer S. Cummings,

later Attorney General in the Roosevelt Cabinet, once solemnly declared that "it goes without saying that it is just as important for a State's Attorney to use the great powers of his office to protect the innocent as it is to convict the guilty."

Ellis Island Alien Detention Station, January 16, 1946. Kurt G. W. Ludecke.

[fol. 16] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Civil 38-293

UNITED STATES OF AMERICA, ex rel., KURT G. W. LUDECKE,
Relator

against

W. FRANK WATKINS, as District Director of Immigration and Naturalization of the United States for the District of New York, or such person if any, as may have the said KURT G. W. LUDECKE in custody, Respondent

Kurt G. W. Ludecke, Petitioner pro se.

Hon. John F. W. McGohey, United States Attorney for the Southern District of New York, Attorney for respondent, Foley Square, New York 7, N. Y.

OPINION—November 6, 1946

LEIBELL, D. J.

The relator in this habeas corpus proceeding is Kurt G. W. Ludecke, an alien enemy, born in Germany, who was interned here during the war and against whom the Attorney General issued an order of removal from the United States, dated January 18, 1946. A writ of habeas corpus was issued October 18, 1946, on a petition of the relator dated the 14th, from which I quote the following:

"However, as a matter of fact and of record, your Petitioner is not only Not dangerous to the public peace and safety of the United States, because he did not adhere to the said government or to the principles

thereof, but quite on the contrary is an honest legally admitted resident who already long before Pearl Harbor was a true American at heart and in spirit. In Court together with his body he will produce conclusive evidence showing that (1) the Department of Justice did not produce any evidence whatever in said hearings showing that he has adhered to the Nazi Government or to the principles thereof; (2) the charges raised in said hearings are incompetent, irrelevant and immaterial; (3) the entire procedure adopted by the Department of Justice in this matter is un-American and dishonest, arbitrary and illegal, jeopardizing the prestige of American justice by flagrant and cynical violations of both the Constitution and Natural Law itself; as well as the Alien Enemy Act of 1798, author- [fol. 17] izing the constraint of alien enemies; (4) it is guilty of fraud and criminal abuse of power in order to bring about under the cloak of legality the illegal deportation of a legally admitted decent resident alien eligible for citizenship;"

A copy of the removal order is annexed as a part of the "Return to Writ of Habeas Corpus" filed herein October 28, 1946, and reads as follows:

"WHEREAS, Kurt George Wilhelm Ludecke is a German alien enemy over the age of fourteen years who has heretofore been interned by order of the Attorney General dated February 9, 1942; and

WHEREAS, the said alien enemy was, at his request, accorded a full hearing before a Repatriation Hearing Board on the issue of his removal from the United States; and

WHEREAS, upon consideration of the evidence presented before the Alien Enemy Hearing Board on January 16, 1942, and before the Repatriation Hearing Board on December 17, 1946, I deem the said alien enemy to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof; Now, THEREFORE,

It Is Ordered that said alien enemy depart from the United States within thirty days after notification of this order; and

It Is Further Ordered that, in the event the said alien enemy fails or neglects to depart from the United States within the said thirty days, the Commissioner of Immigration and Naturalization is directed to provide for the alien's removal to Germany."

The proclamation of the President referred to in the Return to the Writ of Habeas Corpus was published in the Federal Register, Volume 10, Number 144, page 8947 on July 20, 1945, as follows:

**"PROCLAMATION 2655—REMOVAL OF ALIEN ENEMIES BY
THE PRESIDENT OF THE UNITED STATES OF AMERICA**

A PROCLAMATION

WHEREAS section 4067 of the Revised Statutes of the United States (50 U. S. C. Par. 21) provides:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the [fol. 18] United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;

WHEREAS sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U. S. C. 22, 23, 24) make further provisions relative to alien enemies;

WHEREAS the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

WHEREAS by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2626 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

WHEREAS I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

[fol. 19] IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-

five and of the Independence of the United States of America the one hundred and seventieth.

Harry S. Truman.

By the President: James F. Byrnes, Secretary of State."

The sections of revised statutes referred to in the Presidential proclamation are Par. 21 to 24 inclusive of Title 50 U. S. C. A. and are part of Chapter 3 entitled "Alien Enemies".

The petitioner was born in Berlin, Germany, on February 5, 1890. He was out of Germany for most of the period of 1923 to March 1933. He returned to Germany in March 1933 and became a member of the Nazi party. Later he had some disagreements with other members and as a result he was sent to a German concentration camp, from which he escaped March 1, 1934, after being confined for over eight months. Sometime thereafter he came to this country and published a book, "I Knew Hitler", in 1937. His petition for naturalization as an American citizen was denied December 18, 1939. The day after Pearl Harbor, on December 8, 1941, he was arrested as an enemy alien and after a hearing before an Alien Enemy Hearing Board on January 16, 1942, he was sent to a concentration camp.

Hostilities with Germany ceased and pursuant to the President's proclamation of July 18, 1945, the petitioner was granted a hearing before the Repatriation Hearing Board on December 17, 1945. The minutes of the hearing are not attached to the return to the writ, only the order of removal dated January 18, 1946, which has been quoted above.

The petitioner appeared pro se on the return day of the writ, October 29th, and declined the suggestion of the Court that he should have the assistance of a lawyer in this proceeding. The petitioner came to Court with a typewritten brief to which he had annexed copies of a statement he had prepared for the Alien Enemy Hearing Board of January 16, 1942; a statement which he read before the Repatriation Hearing Board on December 17, 1945; a report he made to the Attorney General, dated January 16, 1946 to supplement the statement of December 17, 1945; and copies of certain affidavits of friends dated November 1945 to the effect that in their opinion the petitioner is worthy of American citizenship and is in no way dangerous to public

peace and safety of the United States. Apparently these affidavits had been submitted at the hearing before the Repatriation Board in December 1945.

The so-called Report of the petitioner, dated January 16, 1946, shows that petitioner knew the nature of the evidence the Repatriation Board was considering in his case [fol: 20] on the two questions of whether he adhered to the Government of Germany with which the United States is still at war (although hostilities have ceased) and whether he is an -lien enemy dangerous to the public peace and safety of the United States. I quote the following from the petitioner's Report of January 16, 1946:

"On December 17, 1945, I had my hearing at Ellis Island before the Repatriation Hearing Board consisting of Mr. Edward J. Ennis, Mr. John Burling, and Mr. W. F. Kelly. Attached statement of which I left a copy with the board for the record speaks for itself, however would be incomplete without supplementing it with a report of the failure of the board to produce the evidence, namely, 'sufficient cause' that would justify my removal out of the territory of the United States. . . ."

"Here is what in opinion of Mr. Ennis (or whatever other responsible person) presents the 'evidence' that justified my internment and now calls for my removal as a 'dangerous' alien enemy—a man with a clean record who has been legally admitted in this country in 1927, who has scrupulously obeyed the law of the land, who has leaned backward to explain himself without reservation to American officials whenever possible.

1) My asking the German consul Wiedemann about my legal status.

2) Passages from a copy of a letter of December 2, 1941, written by me to Claude Bragdon, Shelton Hotel, New York City, and apparently containing controversial remarks about Roosevelt and Hitler.

3) The answer I had given at my hearing before the Alien Enemy Hearing Board at Chicago on January 16, 1942, when asked which side I wished to win the

war. (I said I quote Gandhi who replied 'neither side' to the same question put to him some days ago.)

4) The denial of my petition for naturalization on December 18, 1939.

5) The question of my still being a Nazi in spite of my open break with Hitler and the Nazi party after my escape from a Nazi concentration camp early in 1934, in spite of my condemnation and devastating account of Hitler and his regime in my book 'I Knew Hitler' published by Charles Scribner's Sons in 1937, and in spite of my repeated declaration and easily verified fact that already since 1938 I have adopted the philosophy and morality of Edward Bellamy, whose synthesis and program offer a workable application of the teaching of Jesus Christ and of the abstract truth proclaimed in the Declaration of Independence in practical terms."

"Now, to return to the specific charges presented as 'evidence.'

[fol. 21] 1) Considering the rumor of my denaturalization after the banning of "I Knew Hitler" in Germany in 1938, and considering the denial of my petition for naturalization in the United States in 1939, my inquiry for my legal status is a natural and logical step to take, because in case of the loss of my German citizenship I would have been staatenlos—stateless, certainly an unenviable position, especially in these times.

2) Said letter to Claude Bragdon, written *before* Pearl Harbor by the way, is a private letter addressed to a distinguished and renowned American, therefore decidedly a matter that is nobody's concern but my own, particularly in view of the 'Four Freedoms' and all that implies. (Not wishing to discuss controversial remarks taken out of the context I asked for the whole letter to refresh my memory as to its real meaning. However, significantly my reasonable request was denied.)

3) I quoted Gandhi's reply, first, I thought it was a wise answer for reasons too long to explain now,

and second, certainly Gandhi could not be accused or even suspected of being a Nazi or Nazi sympathizer. Anyway, a strange point of 'evidence' particularly in view of the 'Four Freedoms' and all that implies.

4) It is a matter of record filed with the USA District Court of Michigan Southern District at Detroit that the reason for denial of my petition on December 18, 1938, was *not* because of an alleged dangerousness because of my alleged adherence to a gangster government or to its satanic principles, but because of 'failure to prove attachment to the principles of the Constitution of the United States. With prejudice. Not to refile before five years from date.' In other words, according to the verdict of a Federal Judge in a public court procedure I should have been able to refile my petition on December 18, 1944, and most probably would be an American citizen by now. However, my application to refile a petition for naturalization properly submitted to the Nationality & Status Section of the I. & N. Service at New Orleans, La., was not taken into practical consideration because of my status of an interned alien enemy. Apart from the fact that the denial of my first petition at Detroit was a 'flagrant miscarriage of Justice' to quote a reporter of the Detroit Times—a fact I could easily prove if allowed to do so as already repeatedly stated in communications to Mr. Ennis and other American officials—said denial under no circumstances can serve as a point of evidence to justify my proposed removal as an alien enemy 'dangerous to the peace and safety of the United States.'

5) Am I still a Nazi?—At this point, I wish to state that I am well aware of the false pretense of the whole business, for the gentlemen interested in my removal are not so stupid to believe themselves that I am 'dangerous' in the sense presented for the record and the public. If nevertheless I choose to fight this [fol. 22] miserable humbug, I am doing it also for the record and for a definite purpose which will become clearer as the days go by."

"For your information, I may quote a passage taken from a statement of September 13, 1944, made at the instance of Mr. Raymond E. Bunker, officer in charge of the A.D. station at Algiers, La., and forwarded to Mr. Ennis, which reads as follows:

... It is a matter of record that I have never been a "Nazi" in the sense the Nazi is publicly interpreted, represented, understood and indicated in America ever since Hitler's rise to power in 1933, but especially since Pearl Harbor when war propaganda and lying from all sides intensified hate and confusion throughout the world, so that the 'Nazi,' for instance, in the minds of most Americans is identical with the lowest beast and the very devil himself.

'It is also a matter of record that ever since I became a member of the Nazi party I specialized in foreign politics, therefore had nothing to do with the internal development and domestic policies of the Nazi party. Nor did I have any influence whatever on the moulding of Nazi thought and the shaping of the Nazi system, for the simple reason that except for short visits I was again continuously outside of Germany ever since the spring of 1923 until March 10, 1933, shortly after Hitler became chancellor on January 30, 1933. And of the three hundred and fifty-five days I spent in Germany 1933-34, I rotted two hundred and forty-five days in prisons and in concentration camps, because I consciously and fearlessly opposed certain developments and personalities that jeopardized the very future of the German revolution. . . . Thus, it must be emphasized that I have neither part nor lot in nor the slightest responsibility for whatever happened in Germany, nor whatever Hitler, the Hitler regime, and the Nazi party may be guilty of since the beginning of their rule, for the simple reason that I have been a prisoner in Germany shortly after my arrival in Germany in 1933, and that I have not been in Germany or Europe ever since my escape from a Nazi concentration camp on March 1, 1934."

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"I may emphasize that as a matter of fact I personally worked for Hitler and the Nazi party only up to May 1933, and ever since uncompromisingly opposed the "legitimate" Nazi regime."

"The hearing revealed, however, that neither Mr. Ennis nor Mr. Buring—contrary to the 'full examination' enacted by law—have thought it necessary to read 'I Knew Hitler'—not only a most revealing human document, but also a most important piece of evidence, in my favor, to be sure, because from beginning to end it is full of biting criticism, ex-[fol. 23] posure, and condemnation of Hitler and his chiefs, of Nazi ways and proceedings, often in a language so strong that in the English edition by Jarrolds, London, such passages are modified or omitted entirely because of the severe libel laws in England. Otherwise these gentlemen would have learned of a letter I wrote to Hitler after my escape from Germany and arrival at Geneva in April 1934. (See pp. 752 and 753.) The essential parts of said letter are reproduced in paraphrased form in the book. I quote here only the following:

"Regrettably I could no longer call him my Fuehrer", for I could not longer profess adherence to a party which was willing to treat an innocent and faithful member so shamefully, depriving him of his liberty for eight months without legal (1) procedure and without a hearing, brutally and ruthlessly abandoning him to spiritual and physical destruction."

"... that I was ready to accept the personal injustice for the good of my soul, and to let it go at that. But there was a principle at stake whose importance transcended my unimportant self. Hitler himself, I reminded him, had told a leader's conference in October 1933: "He who courageously demands his right, in the end will get his right". And in another speech he had said that he would retreat "only before reason". In this case reason was on my side. He knew well that the calm admission of error was not a sign of weakness but of strength—a proof of human greatness. And if this last attempt to obtain my rights should also be ig-

nored, I would have to act at my discretion, with only my conscience as my guide.' "

"Finally, for the record, I draw attention to enclosed brief read by me in court and left as evidence on December 18, 1939. Though it did not move the Judge to make an honest decision regarding my petition for naturalization, it nevertheless is perhaps the most-revealing document about by own self. It explains the inner change from the Nazi Ludecke who is dead to the new Ludecke who according to the enclosed affidavits of three trustworthy and distinguished Americans with mature judgment 'is in every respect worthy of American citizenship and in no way dangerous to the public peace and safety of the United States.'

"Enough is said to show that it would be a preposterous lie and criminal abuse of power to brand me with the stigma of deportation as a man 'dangerous to the peace and safety of the United States'. If anything I might be considered dangerous to the peace and safety of hypocrits and liars. However, even that is false, for no longer am I a revolutionary activist because among other things I learned that first I must reform myself before I dare-reform my fellow men, though I am ready any time to give from the little I know to those who still know less than I.

Far be it from me, however, to thrust my goodwill upon anybody and insist to stay in a community [fol. 24] whose public servants "of ill will seek to remove me by pitiful procedures and illegal means. Therefore, I propose that I leave voluntarily as a free man, not as a dangerous alien deportee, at the earliest opportunity provided I shall be allowed sixty days to settle my affairs before sailing date.

Fundamentally, it matters not where I live, for I can strive to live the right life and be of service where ever I am. Besides, it may well be a better thing to do the best I can while I can in the midst of a defeated people suffering in body and soul, than to be a futile and frustrated something in the midst of a triumphant people breathing the foul air of self-complacency, hypocrisy, and self-deceit."

In this habeas corpus proceeding I have considered the statements made by petitioner in the exhibits attached to his brief with the same force and effect as if he had testified to them before me at the hearing on the return of the writ.

That he had been a member of the Nazi party he does not deny; but he insists that he had ceased to be a Nazi when he was put in a German concentration camp in 1934. His answer to a question at the Alien Enemy Board Hearing on January 16, 1942, to the effect that he wished "neither side" to win the war which the Nazi regime in Germany was then waging against this country, indicates that he adhered to the German Government at that time. As to the other evidence before the Repatriation Board, as described in the petitioner's Report, I cannot say that the Board had no right to reject the petitioner's contention that the old Nazi in him was long since dead and that he had been following for many years a new political philosophy based on the writings of the American, Edward Bellamy.

In a habeas corpus proceeding by an alien enemy who has been ordered to depart from the United States within thirty days or be removed therefrom, pursuant to T. 50 U. S. C. A. Par. 21 and Presidential Proclamation #2655, the District Court may not review the evidence on which the Attorney General based his order, for the purpose of determining whether or not the Attorney General's determination was correct. There is no doubt about the constitutionality of the statute or about the power of the President to issue Proclamation #2655. But the Court, in my opinion, may inquire to ascertain if the petitioner was accorded a fair hearing before being ordered deported and whether there was some evidence having probative value to support the Attorney General's conclusion. Deportation is a severe penalty, involving great hardship. *Bridges v. Wixon*, 326 U. S. 135 at p. 147. I do not agree with the Government's contention that the only question the Court may consider in this habeas corpus proceeding is the petitioner's alien enemy status, although there are cases which give support to that view. (*U. S. ex rel Schwarzkopf v. Uhl*, 137 F. 2d 898 at p. 900, decided during actual hostilities and applying T. 50 U. S. C. A. Par. 21 to the internment of a alien enemy.)

[fol. 25] Concerning deportation proceedings under the Alien and Nationality Act, 8 U.S.C.A. Par. 155, Chief Justice Stone stated, in a dissenting opinion in the *Bridges* case at p. 167:

"Congress has committed the conduct of deportation proceedings to an administrative officer, the Attorney General, with no provision for direct review of his action by the courts. Instead it has provided that his decision shall be 'final' 8 U.S.C. Par. 155, as it may constitutionally do. *Zakonaite v. Wold*, 226 U. S. 272, 275, and cases cited. Only in the exercise of their authority to issue writs of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution. *Bilokumsky v. Todd*, 263 U. S. 149, 153; *Vajtaner v. Commissioner of Immigration*, *supra*. And when the authority to deport the alien turns on a determination of fact by the Attorney General, the courts, as we have said, are without authority to disturb his finding if it has the support of evidence of any probative value."

True, the deportation order in the present case was issued under another statute (T. 50-U.S.C.A. Par. 21) effective "whenever there is a declared war". The individual involved was not just an alien, but an alien enemy. Nevertheless, actual hostilities with Germany had ended when the President's proclamation was issued on July 18, 1945. We can well afford to scrutinize more thoroughly a proceeding under a war statute when hostilities have ceased. As Mr. Justice Rutledge put it in his dissenting opinion, *In Re Yamashita*, 327 U. S. 1 at p. 46:

"We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded."

In a habeas corpus proceeding such as this the Court should have the right to consider whether more than the

formalities have been satisfied in the issuance of an order for the deportation of an alien enemy. Assuming, arguendo, that the alien enemy had been peaceful and law abiding and in fact believed in our American institutions and had never since his arrival in this country adhered to the foreign enemy government or its principles, would the Courts be powerless to help him? The statement that it is highly improbable that such a case would ever arise, is no argument against the right of the Court to inquire into the facts of each case so as to be satisfied that the issuance of the deportation order does not involve an arbitrary and unjust use of war powers when actual hostilities have ceased.

Under the President's Proclamation the Attorney General has set up Repatriation Hearing Boards. The relator herein received notice of and attended a hearing in his case before the Board on December 17, 1945. He made the [fol. 26] points he could in his defense before that Board and in subsequent communications to the Attorney General. The letters and communications annexed to the petitioner's brief establish, in my opinion, that the petitioner, an alien enemy, had a fair hearing before the Repatriation Board. He knew the nature of the evidence on which the Government based its charge, that he was dangerous to the public peace and safety of the United States because he had adhered to the Government of Germany and the principles thereof. The evidence was substantial.

Where it appears that the Attorney General's order for the alien enemy's deportation has been made after the alien has been accorded a fair hearing on the issue of his removal from the United States, the determination of the Attorney General, supported by evidence of some probative value, is binding on the District Court. The writ of habeas corpus is accordingly dismissed. Settle order.

Dated, November 6, 1946.

Vincent L. Leibell, United States District Judge.

[fol. 27] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 38-293 .

UNITED STATES OF AMERICA, ex rel. KURT G. W. LUDECKE,
Relator,
against

W. FRANK WATKINS, as District Director of Immigration and Naturalization of the United States for the District of New York, or such person, if any, as may have the said Kurt G. W. Ludecke, in custody, Respondent

OPINION—January 2, 1947

LEIBELL, D. J.:

On October 18, 1946 a writ of habeas corpus was issued on the petition of the above named relator Kurt G. W. Ludecke who alleged that he was illegally imprisoned and restrained in his liberty by Mr. Watkins the director of Immigration and Naturalization Service at Ellis Island. The petitioner appeared pro se. He declined the assistance of a lawyer. The return filed by the respondent set forth the order for the petitioner's deportation dated January 18, 1945 made under the Presidential Proclamation #2655 dated July 14, 1945, in relation to the removal of alien enemies by the President pursuant to Sec. 4067 of the Revised Statutes of the United States (50 U.S.C. §21).

At the hearing before me on October 29, 1946, the petitioner had started reading a long statement which I interrupted and instead received the document and certain letters, etc., thereto annexed. In my opinion filed November 7, 1946 dismissing the writ, I stated:

"In this habeas corpus proceeding I have considered the statements made by the petitioner in the exhibits attached to his brief with the same force and effect as if he had testified to them before me at the hearing on the return of the writ."

Later the respondent noticed an order for settlement for November 20th and petitioner wrote me asking that he be produced at that time to protect his rights. I again sug-

gested to the petitioner that he have a lawyer take care of the appeal and I assigned Mr. Henry K. Chapman, an attorney experienced in Federal practice, to advise the petitioner. Later I informed Mr. Chapman that if he or the petitioner wished to have the hearing reopened for the purpose of offering additional evidence I would give consideration to any such request. The request was made and I set December 26th as the date of the rehearing. The petitioner did not appear but his lawyer was present. The following day, at my direction, the petitioner was brought to Court from Ellis Island and his attorney called him as a witness in his own behalf. In the course of petitioner's testimony he referred to certain affidavits which he had incorporated in a further brief and he also discussed certain parts of the Court's opinion of November 6th.

One affidavit (Ex. 1)¹ is from Marion B. Earnshaw, dated December 20, 1946. She describes the circumstances under which the petitioner was accorded a hearing before the Repatriation Board at Ellis Island on December 17, [fol. 28] 1945. She asserts that Ludecke was treated as one already guilty and that the attitude of the three members of the Board was prejudicial; that they would not tell him of what crime he stood accused; that he was not allowed to read a prepared statement; that he was questioned in such a way as to confuse him; that the hearing was hurried and that her own testimony was taken on the ferry after 6:30 P.M.

A second exhibit² is a copy of a letter dated December 15, 1939 addressed by Dr. P. K. Roest to District Judge Arthur J. Tuttle who denied a petition for naturalization. The letter asked that Judge Tuttle "recognize the change in Mr. Ludecke's thought and life from a Nazi agent to a worthy and promising American." It is part of the record in the naturalization proceedings.

Also included in the brief (which was marked Exhibit 3)³ are copies of affidavits of Christian T. Anderson and Robert S. Steen which apparently were prepared for submission in the aforementioned proceeding for the naturaliza-

¹ See p. 71 of Appendix of Appellant's Brief.

² See p. 75 of Appendix of Appellant's Brief.

³ See p. 78 of Appendix of Appellant's Brief.

tion of Ludecke, but which are still in his possession. They refer to a dinner given by Morley Osborne in December 1938 to which Ludecke was invited and at which he was asked certain questions by the guests. It seems that Mr. Osborne had installed a dictaphone and had recorded the questions and answers. The guests did not know this. Mr. Osborne was later a witness in opposition to Ludecke's application for citizenship in December 1939. The affiants state that what Mr. Ludecke described at the dinner was not his own viewpoint but that of Nazi Germany as he had known it; that Ludecke had so stated at the time; and that there was no evidence to support Mr. Osborne's suspicions concerning Mr. Ludecke.

Mr. Steen in his affidavit (evidently prepared after Judge Tuttle had filed a written opinion) states:

"Further that your deponent declares that the statement made in Court's written opinion, page six (6), saying 'Two witnesses of good standing voluntarily appeared and testified as to the character of recent addresses made by petitioner, showing his lack of attachment to the principles of our Constitution and the slavish attachment to Hitler and the present German cause,' is a misrepresentation as far as the testimony of this deponent is concerned; that though it is true that said Mr. Ludecke explained the Nazi point of view with much warmth, it is also true that the atmosphere of the aforementioned meeting at the Eddystone Hotel was not conducive to a fair estimate of whether or not a man is worthy of becoming an American citizen; and that it is the belief of this deponent that Mr. Ludecke has put the past behind him and possesses the gift of mind and spirit which would make him a good American citizen; * * *"

In his brief submitted December 27, 1946 the petitioner argues that I erred in my opinion of November 6, 1946, when I stated that he (Ludecke) "made the points he could in his defense before the Board (December 17, 1945) and in subsequent communications to the Attorney General," and that "He knew the nature of the evidence on which the Government based its charge that he was dangerous to the public peace and safety of the United States because he had adhered to the Government of Germany and the principles thereof." The fact that Ludecke's "report" of

the proceedings to the Attorney General, although dated January 16, 1946 was not forwarded to Mr. Kelly (a member of the Board) until January 21, 1946; while in the meantime the order of deportation was signed January 18, 1946 does not affect the correctness of the Court's statement. Ludecke's hearing had been held December 17, 1945. The order of deportation was not signed until 32 days thereafter [fol. 29] after. If he did not get his so-called report filed until several days after the Attorney General acted on the Board's findings, it was his own fault. If there was anything in the report that called for any change in or withdrawal of the order of deportation, it was received so soon after the order of January 18, 1946 that the Attorney General could have taken steps to void or modify the order if he thought the contents of the Ludecke "report" warranted any such action. However, that "report" clearly shows that Mr. Ludecke knew the nature of the evidence against him because he lists five items on page 2 thereof and he discusses them at some length in subsequent pages of the report.

As to his knowledge of the nature of the evidence against him the petitioner states in his brief of December 26, 1946:

"As to the point that Relator 'knew' the nature of the evidence on which the Government based its charge that he was dangerous. . . 'it must be emphasized that Relator learned of 'the nature of the alleged evidence' only at said hearing, therefore did not make 'the points he could in his defense before the Board' for reasons already explained on p. 3 of his Statement of December 11, 1946, and for the reasons stated in the sworn Statement mentioned above with which Relator will deal later."

Concerning the hearing of December 17, 1945 the petitioner asserts that it was not a fair hearing; he intimates that the members of the Board were not qualified, were immature, irresponsible and worse. At the last page of his brief he again refers to the members of the Board in this language:—"my judges—are gone. Good riddance. Who are they, anyway?"

The brief refers also to the answer petitioner gave in January 1942, at a hearing in relation to his internment; that he wished "neither side" to win the war. He says the question was "unfair and stupid" and that the answer was "an expression of a mere philosophical and religious

belief forced upon him in answer to an unfair question." He further explains his answer as follows:

"To be perfectly clear, Relator may add here that in saying 'neither side' he was well aware that *neither side* was qualified, emotionally, mentally, and morally, for total victory, therefore incapable to impose or even work intelligently and honestly for a just and lasting peace; hence his morality and awareness dictated that he wish for and pray for a negotiated peace on the basis of an honest understanding towards Universal Brotherhood, though he, well knew that neither Hitler nor Stalin, neither Roosevelt nor Churchill, had the vision and the will, the understanding and the wisdom, least of all the insight and with it the temperantia and the necessary humility to do just that. They did not know and know not yet that the only victory worthwhile is the victory over ourselves, that is, our 'unconditional surrender' to God, and that to conquer others we first must conquer ourselves."

I have reviewed the points and exhibits submitted by the petitioner on the rehearing and I have in mind his testimony. I am still of the opinion that the petitioner received a fair hearing before the Repatriation Board and that the evidence submitted before the Board was substantial.

At this point I should note also that the Circuit Court of Appeals of this Circuit on December 31, 1946 affirmed an order dismissing a similar writ in *Ex rel Schleuter v. Watkins*. The appellate court in affirming the order of Judge [fol. 30] Rifkind approved his opinion reported in 67 F. Supp. 556 and stated:

"* * * the statute authorized the making of an order of deportation of an alien enemy without a court order and without a hearing of any kind."

and that—

"When the procedure is through Executive action the statute calls for no hearing in court or elsewhere.

The opinion of the appellate court closes with this statement:

"The President duly exercised his statutory power in Proclamation No. 2526 and 2655. They did not com-

pel a hearing which could meet the requirement of due process."

The action of the Attorney General in issuing the deportation order of January 18, 1946 is approved and the writ of habeas corpus is again ordered dismissed. Submit a new proposed order incorporating a reference to the rehearing.

Dated, January 2, 1947.

Vincent L. Leibell, United States District Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 38-293

UNITED STATES OF AMERICA, ex rel KURT G. W. LUDECKE,
Relator,

v.

W. FRANK WATKINS, as District Director of Immigration and Naturalization of the U. S. for the District of New York, or such person, if any, as may have the said Kurt G. W. Ludecke in custody, Respondent

ORDER REMANDING RELATOR

The Writ of Habeas Corpus in the above-entitled matter having come on to be heard before this Court on the 29th day of October, 1946, and after hearing Kurt G. W. Ludecke, who appeared in his own behalf, a German native or citizen over the age of 14, who had been previously interned and who had been served with an order of removal by the Attorney General in support of the writ, and John F. X. McGohey, United States Attorney for the Southern District of New York (William J. Sexton, Assistant United States Attorney, of Counsel) in opposition thereto, and an opinion dismissing the writ having been rendered Nov. 7, 1946, and a rehearing having been had on the 27th day of December, 1946, and after hearing Henry K. Chapman, Esq. in support thereof, and upon the petition and a further opinion dismissing the writ having been filed Jan. 2, 1947, the return thereto and all the papers and proceedings heretofore had her-in, it is

Ordered that the Writ of Habeas Corpus be and the same hereby is dismissed, and it is

Further Ordered that the *the* relator be and he hereby is is remanded to the custody of the District Director, Immigration and Naturalization Service, Ellis Island, New York Harbor, New York.

Dated New York, N. Y., January 10th, 1947.

Vincent L. Leibell, U. S. D. J.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Sir:

Please Take Notice, that the relator herein, Kurt G. W. Ludecke, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the order entered herein on January 10, 1947, made by Hon. Vincent L. Leibell, United States District Judge, and from each and every part thereof.

Dated New York, January 21, 1947.

Henry K. Chapman, Attorney for Relator, Office & P. O. Address, 291 Broadway, New York 7, N. Y.

To John F. X. McGohey, Esq., United States Attorney for the Southern District of New York, Attorney for Respondent, Office & P. O. Address, United States Court House, Foley Square, New York 7, N. Y.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF APPELLANT AS TO CORRECTNESS OF THE RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the Transcript of the Record of the said

District Court of the above entitled matter as agreed on by the parties.

Dated April 10, 1947.

Kurt G. W. Ludecke, Appellant.

[fol. 34] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT, OCTOBER TERM, 1946

No. 250.

(Argued June 11, 1947. Decided July 24, 1947)

Docket No. 20572

UNITED STATES ex rel. KURT G. W. LUDECKE, Relator-
Appellant,
against

W. FRANK WATKINS, as District Director of Immigration
and Naturalization of the United States for the District
of New York, or such person, if any, as may have the
said Kurt G. W. Ludecke in custody, Respondent-Appellee

Before L. Hand, Swan and Augustus N. Hand, Circuit
Judges

Appeal from the United States District Court for the
Southern District of New York

From an order dismissing a writ of habeas corpus brought
on behalf of the relator Kurt G. W. Ludecke, the latter
appeals. Affirmed.

[fol. 36] Kurt G. W. Ludecke, Relator-Appellant; Attor-
ney in person.

John F. X. McGohey, United States Attorney, for Re-
spondent-Appellee; William J. Sexton, Assistant United
States Attorney, Counsel.

OPINION

AUGUSTUS N. HAND, Circuit Judge:

Ludecke, the relator-appellant, made an oral argument and submitted a brief, both of which have been interesting and moving. He is a German alien enemy held pursuant to an order of internment of the Attorney General dated February 9, 1942. An order was made by the Attorney General for his removal to Germany under date of January 10, 1946, which recited that he had been given a full hearing before a Repatriation Hearing Board and that upon the evidence there presented the Attorney General deemed him "dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principle thereof."

It is not questioned that Ludecke is an enemy alien, but he argues that the evidence before the Repatriation Hearing Board was insufficient to show that he is a person "dangerous to the public peace and safety of the United States" and that due process of law guaranteed by the Fourteenth Amendment to the Constitution entitled him to a judicial hearing. He also argues that the Alien Enemy Act has ceased to be operative owing to the unconditional surrender of Germany and the cessation of actual hostilities. We have dealt with the first contention in *United States ex rel. Schlueter v. Watkins*, 158 F. 2d 853, and with the second in *United States ex rel. Kessler v. Watkins* in an opinion to be [fol: 37] filed herewith. In both decisions we reached conclusions contrary to the relator's contentions and for reasons which seem to us unanswerable. We accordingly hold that his writ of habeas corpus, whereby he endeavored to review the order of the Attorney General was properly dismissed (1) because the Alien Enemy Act calls for no hearing where the removal of the alien enemy is by executive action, and (2) because that act remains effective so long as a state of war exists with the German Nation, as it still does, under the terms of the President's Proclamation 2714 of December 31, 1946.

We see no reason for discussing the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General for the reason that his order is not subject to judicial review. However, on the face of the record it is hard to see why the relator should now be compelled to go back. Of course there may be much

not disclosed to justify the step; and it is of doubtful propriety for a court ever to express an opinion on a subject over which it has no power. Therefore we shall, and should, say no more than to suggest that justice may perhaps be better satisfied, if a reconsideration be given him in the light of the changed conditions, since the order of removal was made eighteen months ago.

Order affirmed.

[fol. 38] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

U. S. ex rel. KURT G. W. LEDECKE, Relator-Appellant,

v.

W. FRANK WATKINS, as District Director, etc., Respondent-Appellee

JUDGMENT—Filed July 24, 1947

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk, by A. Daniel Fusaro,
Deputy Clerk.

[fol. 39] [File endorsement omitted.]

[fol. 39a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 40] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1947

No. 147, Misc.

KURT G. W. LUDECKE, Petitioner,

vs.

W. FRANK WATKINS, as District Director of Immigration
ORDER GRANTING PETITION FOR CERTIORARI AND TRANS-
FERRING CASE TO APPELLATE DOCKET—April 5, 1948

On petition for writ of certiorari to the United States
Circuit Court of Appeals for the Second Circuit.

A petition for rehearing having been submitted in this
case,

Upon consideration thereof, it is ordered by this Court
that the petition for rehearing be, and it is hereby, granted.

It is further ordered that the order denying certiorari
entered January 12, 1948, be, and it is hereby, vacated; and
that the petition for writ of certiorari herein be, and it is
hereby granted. The case is transferred to the appellate
docket as No. 723.

It is further ordered that the duly certified copy of the
transcript of the proceedings below which accompanied the
petition shall be treated as though filed in response to
such writ.

Endorsed on cover: Enter Petitioner pro se. File No.
52,953. U. S. Circuit Court of Appeals, Second Circuit.
Term No. 723. Kurt G. W. Ludecke, Petitioner, vs. W.
Frank Watkins, as District Director of Immigration. Peti-
tion for writ of certiorari and exhibit thereto. Filed Octo-
ber 21, 1947. Term No. 723 O.T. 1947.

(5775)

FILE COPY

U.S. - Supreme Court, U. S.

FILED

APR 30 1948

**CHARLES ELSON PROFFLY
CLERK**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 723

*Petition
not printed
other parts of
brief not orig.
record*

KURT G. W. LUDECKE,

Petitioner,

vs.

**W. FRANK WATKINS, AS DISTRICT DIRECTOR OF
IMMIGRATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR PETITIONER

✶ **KURT G. W. LUDECKE**

Pro se.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 723

KURT G. W. LUDECKE,

Petitioner,

vs.

**W. FRANK WATKINS, AS DISTRICT DIRECTOR OF
IMMIGRATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR PETITIONER

Attorney In Person

*To the Honorable Fred M. Vinson, Chief Justice of the
Supreme Court of the United States and Associate Jus-
tices of the Supreme Court of the United States:*

Your petitioner, Kurt G. W. Ludecke, attorney in per-
son, respectfully submits that, for the reasons set forth be-
low, the judgment of the Circuit Court of Appeals for the

Second Circuit, entered July 24, 1947 (R. 45)¹ should be reversed and the cause remanded to the District Court of the United States for the Southern District of New York.

In view of the almost unsurmountable difficulties, discouraging complications, and at times unbearable conditions in the disturbing and unhealthy milieu at Ellis Island, under which Petitioner had to prepare his Petition for Writ of Certiorari and Brief in support thereof; in view of his low vitality because of physical exhaustion in which he had to edit, revise, and rearrange said Petition and supporting Brief for the present Brief for Petitioner after his arrival in Washington when learning on April 8 that his petition for writ of certiorari was granted on April 5; and finally, in view of the pressure of time and necessity of improvising practically everything and all that implies as stated in his letter of April 16 to Mr. H. B. Willey, Deputy Clerk, for presentation to the Court;—in due consideration of all this, it should be emphasized and expressly put on record that the unusual problems and situations coming up in the course of this unusual, nay, unprecedented legal struggle, had to be dealt with in an unusual way, wherefore Petitioner further prays that this Brief will not be disregarded for any defect of arrangement and form.

.. Opinions and Judgment Below

The two opinions of the District Court for the Southern District of New York were entered November 6, 1946 (R. 16-26), and January 2, 1947 (R. 27-30). Judgment was entered January 10, 1947 (R. 31). The opinion and judgment of the Circuit Court of Appeals for the Second Circuit were entered July 24, 1947 (R. 35-39).

¹ Bracketed R. with figures appearing in this petition refers to pages of the printed Transcript of Record.

Jurisdiction

The jurisdiction of this Court is invoked under Section 5 (a & b) of Rule 38 of the Rules of this Court and under Article III, Section 2 (1), of the Constitution of the United States. The petition for a writ of certiorari was filed in October, 1947, and the order denying certiorari entered January 12, 1948, was vacated and said petition granted on April 5, 1948.

Statement of Case

History

Petitioner was born in Germany, on February 5, 1890. In 1927, he emigrated to the United States and became a legally admitted resident on August 4, 1927. Three days before there was a "declared war" between the United States and Germany, that is, on December 8, 1941, petitioner was arrested and later interned as a "potentially dangerous alien enemy" for the duration of the war. On May 7, 1946, he received an Order of removal, dated January 18, 1946, and signed by the Attorney General (R. 3). On October 14, 1946, petitioner sued out a writ of habeas corpus (R. 1) to which a return was filed on October 28, 1946 (R. 2). After a hearing on October 29 the Court rendered his opinion on November 6, 1946 (R. 16-26), dismissing the writ. The Honorable Vincent L. Leibell, U. S. D. J., in his letter of November 19, 1946, addressed to petitioner, and again in Court on November 20th when the Order was presented for settlement and signature, "suggested to the petitioner that he have a lawyer take care of the appeal and . . . assigned Mr. Henry K. Chapman, an attorney experienced in Federal practice, to advise the petitioner. Later [said judge] informed Mr. Chapman that if he or the petitioner wished to have the hearing reopened for the purpose of

offering additional evidence [the judge] would give consideration to any such request" (R. 27). The request was made and a rehearing granted, which took place on December 27, 1946. The Court rendered his second opinion on January 2, 1947 (R. 27-30), again dismissing the writ. After the Order of dismissal (R. 31) was entered on January 10th, 1947, a notice of appeal was filed on January 21, 1947 (R. 32). Because of a definite disagreement between petitioner and Mr. Chapman anent fundamentals and procedure, petitioner decided to again proceed *pro se*, and on March 10th an Order of the Appellate Court relieved Mr. Chapman of his assignment as counsel for the petitioner. The instant case was argued on June 11, 1947, Opinion (R. 35-37) rendered and Judgment (R. 38-39) affirming Judge Leibelt's Order filed July 24, 1947.

It must be emphasized at this point, that Judge Leibelt in his Opinion of November 6 (R. 19) mentions only 5 of the 13 papers submitted at the first hearing and refers to and quotes from only one of these, namely "the so-called report of the petitioner" (R. 19); and again in his Opinion of January 2 quotes in paraphrased form or verbatim—only certain parts of the papers submitted at the second hearing, thus using throughout that absolute weapon of controversy, the excerpt lifter. Moreover, a comparison of the lifted excerpts in said Opinion of November 6 with the full text of the Report of the petitioner (R. 7-15) shows that even the way these quotations are arranged is not the proper way. For instance, the arrangement of quotations on page 23 of the Record gives the impression that here the complete text of that part of the original is quoted, whereas actually two and a half pages are not quoted. (The importance of this point will become clearer later on.)

Therefore, petitioner wished to submit to the Appellate Court the full text of at least the most important papers, so

that the Court would have all the information needed to reach a just decision. However, till then unfamiliar with the Rules of the United States Circuit Court of Appeals for the Second Circuit, Petitioner asked Mr. Chapman who at the time still acting as his assigned attorney wrote on February 26 that I "prepare six (6) copies of the following papers which will constitute the record on appeal to be filed by March 10, 1947, . . . 1. Petition for Writ of Habeas Corpus. 2. Return by the Director of Immigration and Naturalization. 3. Both opinions of Judge Leibell. 4. In as condensed form as you can make it, your statements which were considered as testimony by Judge Leibell. We are proceeding on the applicability of Section 23 of Title 50 to your case." That—after writing me on January 3, 1947, that "under the circumstances, whether the hearing accorded you was fair or unfair it was *only an act of grace and mere surplusage.*" (Italics are petitioner's.) Though layman in court matters Petitioner sensed that there was something wrong and (after being relieved of Mr. Chapman as mentioned above and after certification of the Transcript of Record by the Clerk of the District Court) accompanied by an Ellis Island guard and Mr. William J. Sexton, Assistant United States Attorney, for Respondent-Appellee, presented the said certified Record together with his Brief for filing to the Clerk of the Appellate Court—that is, the Brief of twenty-two pages with an Appendix, the two amounting in toto to 98 pages. Learning that the Clerk would not receive a Brief of more than fifty pages, Petitioner—as *prisoner not being a free agent* and all that implies, embarrassed by a very impatient opposing counsel, the aforementioned Mr. Sexton, the Record already certified and docketing fee paid, furthermore the necessary change meaning under the circumstances a most complicated business apart from the very little time left—weighed down with all these difficulties knew no better at the moment than

to trust in God and correct the error simply by removing the entire Appendix and by rectifying the Index by crossing out the indexed Appendix with footnote (A. 95)² and filing merely the Brief, which was done.

That may suffice to explain (1) why the typewritten certified Transcript of the Record is so incomplete, therefore does not give an honest and right picture of the case and of the situation; (2) why Petitioner asked the Appellate Court on June 11 before beginning his Oral Argument to be allowed to submit some additional papers which was granted; (3) why Petitioner later had the said additional papers certified together with some Exhibits for use in his petition (A. 126); and finally (4) why Petitioner now prays to be allowed to submit with this petition an Appendix containing the full text of the most relevant and significant papers submitted to Judge Leibell on October 29 and December 27, 1946, as well as of papers filed with or later submitted to the Appellate Court on June 11, 1947, and lastly a volume of the above mentioned Exhibits not appearing in the Record, so that this Honorable the Supreme Court of the United States may have all the information needed to reach a just and wise decision in this all important fundamental case.

Facts and Points

(1) Petitioner is restrained, detained and deprived of his liberty within the Southern District of New York of the United States District Court, to wit, at Ellis Island, New York Harbor, by the Respondent W. Frank Watkins, as District Director of Immigration etc., and his agents under color of authority of the United States.

² Bracketed A with figures appearing in this Brief refers to pages of the typewritten Appendix to the printed Brief for Petitioner.

(2) Respondent is acting under orders from the Attorney General of the United States and bases his right to detain this Petitioner with the intention to deport him to Germany as an allegedly dangerous alien enemy solely upon the Alien Enemy Act of 1798 (Title 50, U. S. C. 21-24) and Presidential Proclamations thereunder.

(3) No warrant for the arrest of this Petitioner was ever issued by any Court, Judge or Justice of the United States of America; also, Petitioner was never accorded a hearing before any tribunal whatsoever to determine the question of whether or no he was a dangerous resident alien enemy and whether or no he had violated any of the Presidential regulations pertaining to alien enemies and under which any such alien would be subject to internment and deportation, wherein he was:

a. given any copy of the charge against him and appeared before a court or judge as provided in Sec. 23, Title 50, U.S.C.;

b. permitted to be represented by counsel, and either he or his counsel or both were permitted to cross-examine any and all witnesses against him;

c. permitted to produce evidence and witnesses to refute any charges and any testimony that might have been given against him.

Petitioner was not even given an administrative hearing, wherein the recognized indicia of a fair hearing were present, in spite of the fact there was no longer any danger of espionage or sabotage etc. warranting the suspension of civil rights of *resident* alien enemies, who were expressly given the right not merely to an administrative but to a judicial hearing under Section 23 aforesaid.

(4) This Petitioner is informed and believes and, therefore, charges the fact to be that the President of the United

States never did actually direct or authorize either the Attorney General of the United States or any other official including Respondent to imprison or deport Petitioner, but instead some employee of the Department of Justice apparently of the so-called Alien Enemy Control Unit, who is not known to Petitioner, has arbitrarily of his own initiative and without such authority determined, that Petitioner is a dangerous alien enemy, and is acting under color of the United States without authority to effect the deportation of Petitioner, and that the President of the United States in Proclamation No. 2655 authorized the Attorney General to deport only these enemy aliens whom the said Attorney General deemed to be dangerous from among those "alien enemies now or hereafter interned," "pursuant to the aforesaid Proclamations," and that the aforesaid Proclamations so referred to specify that the enemy aliens before being interned be given a judicial hearing as provided under Section 23, U. S. C., Title 50.

(5) Proclamation No. 2655 purporting to authorize the Attorney General to deport enemy aliens deemed to have been dangerous to the public peace and safety (without due process of law in spite of the said Section 23) is too broad and vague in that it authorizes the deportation of an enemy alien for adherence "to the principles of" a government with which the United States is in a state of a "declared war" and, therefore, partakes of the nature of thought police and is not only a violation of a resident enemy alien's freedom of speech but even of his freedom of thought.

(6) Neither the President of the United States nor any other officer of the government thereof has the power in time of peace or in war to order the removal from the United States or even imprisonment, restraint or detention under the Alien Enemy Act, when there is no longer any clear and present danger of espionage or sabotage etc., and

there has not been any such clear and present danger since Germany's unconditional surrender on May 8, 1945, and a resident German alien, such as Petitioner, has vested constitutional rights not only of freedom of speech but also of due process of law, whereby neither the President of the United States nor any officer of the government thereof has the power in time of peace or war to make such an order under the Alien Enemy Act unless a judicial hearing before a court or judge as provided in Section 23 has been awarded such a resident enemy alien, when the courts are open and available for that purpose, and there is no justification, by virtue of any clear and present danger, for summary action in contravention of such constitutional as well as inherent natural rights of due process of law under color of the said Alien Enemy Act and the delegation of power therein given to the executive branch of the government.

(7) Certain employees in the Department of Justice, that is, in the office of the Attorney General, who are not known to Petitioner, are subverting the intent and purpose of the Alien Enemy Act, which provided for the determination of the question of whether or not resident enemy aliens were dangerous to the peace and safety of the United States by a judicial hearing and according to due process of law and pursuant to the civil rights of such residents, and such employees are likewise subverting the intent and purpose of Presidential Proclamation No. 2655, which is limited to those enemy aliens already interned lawfully pursuant to previous Proclamations Nos. 2525-2526 which were intended merely to provide for the detention and restraint of enemy aliens pending a judicial hearing under Section 23, Title 50, U. S. C., to determine whether or no upon such judicial hearing they ought to be interned as dangerous to the public peace and safety, and are causing the Alien Enemy Act and the aforesaid Proclamations to be wrongfully applied to

Petitioner (and other German resident aliens), in order to bring about—under the cloak of legality—the illegal internment and deportation of a legally admitted law-abiding decent resident alien eligible for citizenship, that is, in violation of his unalienable inherent natural rights, as a member of the human race, and of his civil rights, as a resident, to due process of law.

(8) The GOVERNMENT,³ represented by the President of the United States, represented by the Attorney General of the United States, represented by the Alien Control Unit of the Department of Justice, represented by the Acting Director of the Alien Control Unit of the Department of Justice, represented by the Immigration and Naturalization Service of the Department of Justice, represented by the Respondent, W. Frank Watkins, as District Director for the District of New York, represented either by the United States Attorney for the Southern District of New York, represented by Assistant United States Attorneys, or represented by the District Counsel of the New York District of Immigration and Naturalization Service, Department of Justice, represented by the Assistant to the District Counsel etc. etc., this mysterious GOVERNMENT—lost in a murky background—insists in ignoring the proverbial “unalienable rights” of every human being as well as the said Section 23 of the Alien Enemy Act and insists in holding that this Petitioner has no rights whatsoever, simply because he is a German alien enemy, therefore can be imprisoned at will, deemed dangerous at will, and be deported at will—without due process of law. Says the Return To Writ Of Habeas Corpus (R. 2):

1. The relator, Kurt G. W. Ludecke, is being held in custody as an alien enemy pursuant to the provisions of

³ In Court, Petitioner observed, Ass. U. S. Attorneys when arguing his case and similar ones always used with emphasis the term “The Government holds that . . .”

Title 50, United States Code, Section 21, and the Proclamation of the President, No. 2526, dated December 8, 1941.

2. The relator is a native, citizen, denizen, or subject of Germany.

3. The relator was born in Berlin, Germany, on February 5, 1890.

4. The relator has been ordered removed from the United States by an order of the Attorney General dated January 18, 1946, pursuant to proclamation of the President, No. 2655, dated July 14, 1945.

(9) The Honorable Judge Leibell of the United States District Court for the Southern District of New York, however, in his Opinion of November 6, 1946, does "not agree with the Government's contention that the only question the Court may consider in this habeas corpus proceeding is the Petitioner's alien enemy status" (R. 24) and holds that "the Court should have the right . . . to inquire into the facts of each case so as to be satisfied that the issuance of the deportation does not involve an arbitrary and unjust use of war powers when actual hostilities have ceased" (R. 25). (It may be noted here in passing, that Judge Leibell apparently is the only one who stated his disagreement with the Government on that point, because to date—as far as Petitioner knows—other District Judges dealing with habeas corpus writs of German alien enemy residents accepted the Government's view in full and accordingly dismissed the writs outright, while the Appellate Courts affirmed their Orders as did the Circuit Court of Appeals for the Second Circuit in *Ex Rel. Schueter v. Watkins*.)

(10) After reaching the conclusion, that Petitioner did have "a fair hearing" and that "the evidence was substantial" (R. 26), said Judge dismissed the writ. In other words, Judge Leibell who in this habeas corpus proceeding

"considered the statements made by petitioner in the exhibits attached to his brief with the same force and effect as if he had testified to them before me at the hearing on the return of the writ" (R. 24), holds that *on the face of the record* Petitioner's deportation is a just and equitable act.

In view of the political aspect of hunting down the alien enemy huns, it is obvious why Judge Leibell wished to get back into line after realizing his faux pas and becoming aware of the vulnerability of his Opinion, which is as poorly written as it is conceived. He suggested "a rehearing, for the benefit of the Petitioner (1), of course, "if he wished to have the hearing reopened for the purpose of offering additional evidence" (R. 27), in reality, however, for the benefit of his honorable self, because a rehearing alone offered the sought for opportunity for a second Opinion, which would save his face and spare the Government from an *inconvenient* precedent. And the date of the rehearing was so timed, that the decision of the Appellate Court, which on "December 31, 1946, affirmed an order dismissing a similar writ in *Ex Rel. Schlueter v. Watkins*" (R. 29), could be used in his Opinion of January 2, 1947, as the *convenient* precedent—welcome to the Government. Needless to emphasize the fact, that Petitioner's writ was again dismissed with gusto in spite of Petitioner's convincing Statement (A. 65) and Argument (A. 71) offering the "addi-

⁴See second paragraph of p. 27 of Record. In this connection, the fact is significant that the Court ordered minutes and even the transcript of these minutes of Judge Leibell's talk to and advice to Petitioner to take a lawyer, emphasizing again and again the excellence of the recommended lawyer, the said Mr. Chapman, insisting that Petitioner should trust this lawyer, cooperate with him, and follow his good advice. (1) Nota bene, Petitioner's appearance in Court on November 20, 1946, referred to above, was not a hearing or argument of any sort, also the fact, that of course minutes exist of Petitioner's second hearing on December 27, but that the Judge did not order the transcript of these minutes of this second so revealing hearing.

tional evidence" that would have convinced a fair tribunal at any time in any land.

(11) In happy contrast to Judge Leibell's singular performance, the three Circuit Judges—while still holding that the Attorney General's order "is not subject to judicial review" (R. 37)—unanimously declared that Petitioner's Brief (A. 94) and Oral Argument (A. 121) "have been interesting and moving" (R. 36), and that "on the face of the record it is hard to see why the relator should now be compelled to go back . . . and . . . suggest that justice may perhaps be better satisfied, if a reconsideration be given him in the light of the changed conditions, since the order of removal was made eighteen months ago" (R. 37).⁵

Though affirming his ORDER the three Circuit Judges, L. Hand, Swan and Augustus N. Hand, do *not* adopt Judge Leibell's OPINION, because they find that the Court has not the power to inquire into the facts of the instant case determined by executive action, but that "on the face of the record" Petitioner's deportation would not be a just and equitable act, but on the contrary would be "an arbitrary and unjust use of war powers when actual hostilities have ceased" (R. 25)—for that is the real meaning of the courteous and cautious language adopted by the Honorable Circuit Court of Appeals. And more than that! It is practically, on the one hand, an intimation to the Department of Justice to release this Petitioner, and, on the other hand, an intimation to Petitioner if necessary to take his case before the Supreme Court for a final decision, because the Supreme Court of the United States has the power and

⁵ It is significant that such a qualifying statement practically exonerating the Petitioner and revoking the negative conclusion of its own decision so far apparently is the only one made by any Court dealing with habeas corpus petitions of German alien enemies.

the right to inquire into the facts of a case determined by executive action.

(12) Judge Leibell declares in his Opinion of November 6, 1946, that

"In a habeas corpus proceeding by an alien enemy . . . the District Court may not review the evidence on which the Attorney General based his order [of removal], for the purpose of determining whether or not the Attorney General's determination was correct. There is no doubt about the constitutionality of the statute or about the power of the President to issue Proclamation No. 2655. But the Court, in my opinion, may inquire to ascertain if the petitioner was accorded a fair hearing before ordered deported and whether there was some evidence having probative value to support the Attorney General's conclusion. Deportation is a severe penalty, involving great hardship. . . . I do not agree with the Government's contention that the only question the Court may consider in this habeas corpus proceeding is the petitioner's alien enemy status, although there are cases which give support to that view" (R. 24).

and that

"In a habeas corpus proceeding such as this the Court should have the right to consider whether more than the formalities have been satisfied in the issue of an order for the deportation of an alien enemy. Assuming, arguendo, that the alien enemy had been peaceful and law abiding and in fact believed in our American institutions and has never since his arrival in this country adhered to the foreign enemy government or its principles, would the Courts be powerless to help him? The statement that it is highly improbable that such a case could ever arise, is no argument against the right of the Court to inquire into the facts of each case so as to be satisfied that the issuance of the deportation order does not involve an arbitrary and unjust use of

war powers when actual hostilities have ceased" (R. 25).

(13) It so happens, that actually "such a case" did arise, the "highly improbable" his Honor assumed, arguendo, namely that this Petitioner "had been peaceful and law abiding and in fact believed in our American institutions and has never since his arrival in this country adhered to the foreign enemy government or its principles", and that "the issuance of the deportation order" does indeed "involve an arbitrary and unjust use of war powers when actual hostilities have ceased." Therefore, Judge Leibell's question "would the Courts be powerless to help him" is a decisive question, which must be answered. His Honor's answer and the way he "helped" this Petitioner now is a matter of record. The three Circuit Judges avoided a direct answer by stating that they "see no reason for discussing the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General for the reason that his order is not subject to judicial review" (R. 37). But the sentences following this last quotation contradict Judge Leibell and nullify the really damaging part of his Opinion as illustrated above on pages 11 and 12 of this text. That is why the Appellate Court's Opinion while negative also is so positive and so significant, therefore helping Petitioner indeed in allowing him the moral victory by conceding, that Petitioner "made an oral argument (A. 121) and submitted a brief (A. 94), both of which have been interesting and moving" (R. 36); and a factual victory by practically stating that "on the face of the record" this Petitioner did *not* have a "fair hearing" and that the evidence was *not* "substantial", thus suggesting that he should be released by administrative order. Apparently, the three Circuit Judges unanimously decided that that was the most they could do "to help him," because

they believed that they did not have the power to do more, and because they did not wish to effect his release by an Order of the Court, probably first, in view of the Appellate Court's own decision in *United States ex rel. Schlueter v. Watkins*, and second, because they did not wish to embarrass the Government. Petitioner's release by an Order of the Court would have created a decisive precedent, for it would mean the judicial recognition of the validity of the Bill of Rights for all men in time of peace and war, as well as the validity of the unalienable, inherent natural rights of every member of the human race in time of peace and war, and on the other hand, it would recognize the validity of Section 23 of Title 50 and thus condemn the "Government's" illegal procedure and untenable interpretation of the Alien Enemy Act of 1798. That is a matter for the Supreme Court to decide, the three Circuit Judges may have thought, should the "Government" insist on the deportation of this Petitioner.

(14) After declaring that "on the face of the record it is hard to see why the relator should now be compelled to go back" the Appellate Court says that "of course there may be much not disclosed to justify the step" (R. 37). A justifiably cautious, therefore proper remark. Hence it is important indeed to prove beyond doubt, firstly, that Petitioner did *not* have a "fair hearing" and, secondly, that the alleged evidence is not "substantial" to justify Petitioner's internment let alone his deportation; or, in other words, that he is not only *not* "dangerous to the public peace and safety of the United States" but, quite on the contrary, is a useful member of society striving for the Right Life as best he can and for many years already a true American at heart and in spirit, therefore eligible for citizenship (R. 1 and 6; A. 80, 83, 88, 90, 133-4).

It would appear, that the fact already is established that Petitioner did *not* have a fair hearing. The factual and cir-

cumstantial evidence submitted to the lower Courts, contained partly in the Transcript of the Record, partly in the Appendix annexed to this Petition, is clear, conclusive and convincing. Special attention deserves the affidavit of Mrs. Marion Bellamy Earnshaw, the daughter of Edward Bellamy, which Judge Leibell mentioned in his Opinion of January 2 (R. 28), but ignored. Said affidavit appears in full as Exhibit I in Petitioner's Argument (A. 78) submitted at his second hearing before Judge Leibell.

That leaves the question of the alleged evidence. The Order of removal speaks "of the evidence presented before the Alien Enemy Hearing Board on January 16, 1942, and before the Repatriation Hearing Board on December 17, 1945," (R. 3). The truth is, that no evidence whatever was presented or even suggested at the hearing on January 16, 1942, as clearly stated in Petitioner's letter of February 22, 1942, to Mr. Francis C. Biddle, then acting Attorney General, the essential parts of which are quoted in Petitioner's Statement of December 17, 1945 (A. 129).

As to the evidence allegedly presented before the Repatriation Hearing Board on December 17, 1945, Petitioner calls attention to his declaration made at the beginning of the said hearing (R. 7). Again it must be emphasized, that Petitioner never, that is, neither at the said hearings nor at any other time since his arrest on December 8, 1941, till this very day was told in definite terms of any specific charges as to his alleged potential and later actual dangerousness because of his alleged adherence to the Hitler Government or to the principle thereof, or was served with a properly written indictment specifying the charges, or was ever confronted with facts which were presented to him as "evidence" showing his dangerousness because of his alleged adherence to the Hitler Government "or to the principle thereof." (R. 3). It was not done and could not be done for the simple

reason, that there is no evidence on the ground of which an indictment with specific charges could be made, which would be accepted in any respectable court throughout the civilized world. At this point, in order to avoid misunderstanding, it should be noted that pure irony prompted Petitioner to use the terms "specified charges" and "evidence" in his so-called Report, for instance:

"Here is what in the opinion of Mr. Ennis . . . presents the 'evidence' . . ." (R. first paragraph of p. 9) and

"Before I proceed to deal with the above 'charges' and points of 'evidence' . . ." (R. second § of p. 8) and

"already it is evident, that it is absurd to consider me 'dangerous' on the ground of above specified charges . . ." (R. third § of p. 8) and

"Now, to return to the specific charges presented as 'evidence.'" (R. third § of p. 9).

The minutes of said hearing would show if produced, that it is a fact that not one of the points, for instance 1, 2, 3, 4, and 5 (R. 8), ironically spoken of in said Report as "specified charges" and "evidence," was presented as such and that all Petitioner could get out of the Board in lieu of specific charges and valid evidence was a shower of sham in form of incompetent, irrelevant, and immaterial questions and arguments and assertions meant to confuse and irritate the Petitioner, a sorry performance which my witness, Mrs. Marion B. Earnshaw, well observed and described in her affidavit already mentioned above. The fact of the absence of charges and evidence is also noted in Petitioner's Statement of December 11, 1946, for Judge Leibell (A. 67), and in his Statement of September 24, 1946 (A. 139).

In short, first, what Petitioner ironically labeled "charges" and "evidence" was neither, nor was it presented as such by the Board; second, it already is established as incompetent, irrelevant and immaterial, therefore

does not call for additional proof and comment. Hence, the evidence spoken of in the Order of removal does not exist, meaning that the Order is based on fraud. Or there are some trumped up charges never mentioned thus unknown to Petitioner, because they are based on false evidence fabricated by the said employees of the Department of Justice—obeying perhaps influences in—or outside—the Government—who induced the Attorney General to sign an infamous document, the removal Order of this Petitioner. Maybe even President Truman was induced in a similar way to sign the Presidential Proclamation No. 2655 on July 14, 1945, for the new President was absorbed just then with his imminent voyage to Potsdam and far too busy with more important things to have time to go into small matters such as the removal of some huns. And had not President Roosevelt signed the Proclamations Nos. 2525 and 2526 also dealing with alien enemies? Also, there are times when the greatest and most conscientious ruler has to trust his capable advisers.

Anyway, whether the removal Order with the alleged evidence results from pure fraud or from the fraudulent manipulations of dishonest public servants, or from the red tape, indifference and ill will of a cursed bureaucracy, will be known only if the Supreme Court in the course of a full examination or a Congressional Investigation Committee will issue an Order insisting on the production of the minutes of Petitioner's hearings as well as of papers and records involving this "alien enemy's" ordered arrest, detention, internment and removal.

In this connection, most revealing and significant is a letter mentioned and quoted in full in the Opinion of the Hon. Simon H. Rifkind, U. S. D. J., dated August 6, 1946, in *USA ex rel. Schlueter v. Watkins*. Said Judge states:

"Relator's counsel asked for production of the Attorney General's file concerning the relator. Judge

Bright, on a motion made before trial, had ordered the production of the record of whatever hearing relator may have had. The United States Attorney refused to produce the record and instead submitted a letter from the Acting Attorney General which is set forth in the margin. 2)." .

2) Office of the Attorney General
Washington, D. C.

May 29, 1946.

John F. X. McGohey, Esq.
United States Attorney
United States Court House
Foley Square
New York 7, New York

Attention: Stanley Lowell, Assistant U. S. Attorney

DEAR MR. MCGOHEY:

I refer to your telephone conversation of May 29 in which you advised my office that by order of even date Judge Bright of the District Court of the United States for the Southern District of New York had ordered the production of records and papers of the Department in a habeas corpus proceeding involving an alien enemy ordered removed pursuant to the Alien Enemy Act of 1798.

Your attention is called to the provisions of Attorney General's Order #3229, dated May 2, 1939, which forbid disclosure of confidential documents of the Department in the absence of my authorization. All the files and documents relating to alien enemy proceedings, including those both of the Alien Enemy Control Unit and of the Immigration and Naturalization Service, fall within this category.

I understand that, in the instant case, relator's status as an alien enemy is conceded. In view of the clear line of authority holding that, in habeas corpus proceedings brought to test the propriety of action taken under the Alien Enemy Act of 1798 in time of war, the only sub-

ject into which the courts may properly inquire is whether in fact relator is an alien enemy, I do not feel warranted in authorizing the disclosure here in question.

You are authorized to show this letter to the court and to request that the order to produce records of this Department be vacated in so far as it affects those in the confidential category.

Please advise me at the earliest possible moment of any developments which may occur.

Sincerely

(S.) J. HOWARD McGRATH
Acting Attorney General.

Indeed an easy way to dodge the issue! The implications of this priceless letter are too obvious to call for comment at this point. Suffice to say that Schlueter was suddenly released on March 26, 1947, almost three months after Judge Rifkind's Order dismissing his writ was affirmed. The mysterious Alien Control Unit of the Department of Justice, the working of which must be by now a mystery to the Department itself, had made the sudden discovery it seems with an acumen so peculiar to it, that Schlueter was not dangerous after all, that he was but a harmless delicatessen clerk—Lo and Behold! the very same Schlueter who had been so "dangerous to the public peace and safety of the United States" that he had to be ordered removed, whose file regarding the records involving his removal was so "confidential" that its production had to be refused!!!

(15) Here is another document which speaks for itself and, in a way, may serve as a supplement to the preceding point (14). It reads as follows:

DEPARTMENT OF JUSTICE
WAR DIVISION

NOTICE OF DETERMINATION OF REPATRIATION OF ALIEN
ENEMY

To: Kurt G. W. Ludecke
Algiers, La.
39/3087

146-13-2-37-89

1. By proclamation of July 14, 1945, the President of the United States, acting under the authority of the Alien Enemy Act of 1798 (50 U.S.C. 21-24), has prescribed the following regulations, additional and supplemental to those prescribed by earlier proclamations:

"All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe."

2. Pursuant to the above proclamation and based upon the evidence considered at your earlier alien enemy hearing or hearings, it has been determined that you should be removed and repatriated to the country of your nationality as soon as arrangements for your transportation can be made.

3. You are hereby notified that prior to the issuance of a final order for your removal and repatriation you are entitled to a hearing before a hearing board appointed by the Attorney General. If you request a

hearing as hereinafter provided, you will be accorded an opportunity to appear in person and to present evidence to show that you are not dangerous to the public peace and safety of the United States because of your adherence to an enemy government or to the principles of government thereof, or to show mitigating or extenuating circumstances in your case which you believe should constitute a valid reason why you should not be ordered repatriated.

4. You may obtain a hearing before a repatriation hearing board by executing in triplicate the form of Acknowledgment of Notice and Request for Alien Enemy Repatriation Hearing which will be given to you and by transmitting it to an official of the Immigration and Naturalization Service in charge of your custody within ten days of receipt of this notice. If a written request is not made on this Acknowledgment form within ten days of receipt of this notice, you are advised that the Attorney General will enter a final order for your removal from the United States and repatriation to the country of your nationality. If you request a hearing on this Acknowledgment form within the prescribed time you will be notified of the place and time of the hearing. A member of your family or any other individual may accompany you during your appearance before the hearing board and you may have witnesses appear and testify on your behalf or submit affidavits or other documentary material on your behalf.

If you do not wish a hearing you are required to indicate that fact on the prescribed Acknowledgment form.

By order of the Attorney General.

HERBERT WECHSLER,
Assistant Attorney General.

Washington, D. C.
July 26, 1945.

Receipt of this notice is hereby acknowledged (Date)
July 31, 1945.

Signature of alien enemy.

Above Notice is mentioned but only partly quoted in Petitioner's Report (R. 8 and 9) and also dealt with in the Statement (A. 128 and 139) which was sent with the Report to the Attorney General on January 16, 1946. In the light of the later developments the referred to comment in these two papers regarding the said Notice carries even more weight today than when it was made, just as the hypocrisy of that Notice in connection with the Order of removal (R. 3), as well as the fraud of "the farcical hearings granted alien enemies to serve as window-dressing for the public" (R. third § of 5) are still more apparent today. At this point, special attention is called to Petitioner's Statement for the Attorney General of September 24, 1946, which speaks for itself (A. 139).

After examining this material the Honorable Supreme Court will understand why Petitioner after the tragic death of the "dangerous" alien enemy, Rudi Weiler, wrote that letter *J'accuse* to the Attorney General on January 14, 1947, and enclosed a copy of his letter to Mrs. Weiler and of her answer to him (A. 151). And it will also be understood why now Petitioner is quoting from a very significant letter of Mr. A. L. Pomerantz, former Deputy Chief Counsel at Nuremberg, who was senior trial counsel in all Nazi industrialist cases, published in the New York Times of May 4, 1947. His letter is so significant because the situation and procedure he attacks present a striking parallel to the senseless persecution of those so-called alien enemies, i.e., civilian internees who are decent legally admitted alien residents, although the war is over since May 8, 1945, and the end of war hostilities officially declared on December 31, 1946. Listen:

"... our Government's prosecution of Nazi criminal organizations at Nuremberg . . . observed the highest traditions of American legal process. Indictments, setting forth the charges in detail, were served

on the affected organizations. They were afforded the right to counsel of their own choosing, failing which we furnished them with counsel. . . . This was American due process in Germany. This was our show window display for the German people to see that no one, not even Goering, could be condemned without a fair trial.

"Upon returning to the United States I found that, whatever we may have taught the Nazis, we have absorbed into our own legal system the German tyranny that we fought and inveighed against. I refer to our executive order which provides that any one of the two and one-half million employees in the executive branch of our Federal Government can be summarily fired if he is, or ever was, a member of, or in 'sympathetic association' with, any organization or combination of persons placed by the Attorney General . . . on his private black list.

" . . . The Attorney General merely says: 'Thou art condemned.' Thereupon its members, past, present and future, are automatically adjudged guilty of the heinous offence of disloyalty to their Government. The American citizen, unlike his German counterpart, is afforded no opportunity to challenge the Attorney General's ex parte condemnation of his organization.

"This conviction without a trial, borrowed from the darkest days of the Nazi inquisition, is a startling innovation in American judicial procedure. . . . On this charge of personal disloyalty, the governmental employee gets a trial—a mockery of a trial . . . on an indictment that doesn't inform you of the charges, and with no opportunity to confront or examine, or even to know of, the complaining witnesses. And the burden of disproving undisclosed charges rests on the defendant. It should be added—shades of the malodorous German People's Courts!—that the tribunal which hears these cases is appointed by and responsible to the department head, who may be the complainant.

"This is twentieth-century American justice.

" . . . Zechariah Chafee, Jr. . . . takes the calm view that 'the situation can be redeemed' by the self-

imposed discipline of the 'heads of the individual departments or agencies' charged with enforcement.

"... But I find no comfort or redemption in this hope. In the first place, we proudly boast that ours is a government of laws, not of men. It is our laws which furnish us the prophylaxis against the possibility of abuse from evil or stupid men. Second, I would prefer, particularly in this hysterical period, not to be dependent on the grace and conscience of the wild-eyed crusaders who may make up a large part of our enforcement units. In these days, when the issues are getting sharper and hotter, when dissent from Government policy brings down on the head of the dissenter pathological fury, even threats of jail, it is dangerous to have to depend on those who have the power to use it temperately.

"In my judgment, the Executive Order is, both substantively and procedurally, the most Nazi-like and terrifying law since the ALIEN AND SEDITION ACTS. It should be repealed in toto. There are enough laws already on our books to protect us against treason, sabotage and real disloyalty."

That's exactly what the said civilian alien enemy internees have been getting all along. "Thou art condemned!" says the Attorney General looking at his "private black list"—concocted by God knows whom—and thou art imprisoned for years and finally deported, branded as a "dangerous" animal, to suffer more persecution, internment and hardships in the "horror camp" that hunger-ridden prostrate Germany is today. All this without due process of law, simply by dictation on the basis of the most arbitrary discrimination and procedure.

In the light of the dangerous development illustrated above by an intelligent and informed American, the Opinion of Judge Leibell as well as the Brief for Respondent-Appellee are natural symptoms of an alarming state of affairs. Diseased or immature minds cannot or do not wish to under-

stand that the argument that the United States still is technically at war with a non-existing German state is mere false pretense for the exercise of arbitrary power in contravention of vested natural and constitutional rights; and that the continuance of the exercise of such tyrannical powers is un-American and dishonest, illegal and a great threat to the American Way of Life compared to which any alleged danger from this Petitioner is infinitesimal.

It is of course obvious that the men responsible for the Alien Enemy Act of 1798 never intended it to become an instrument in the hands of irresponsible boobs to persecute and torture helpless civilian internees, as it is equally obvious that the actual manner of interpretation and application of this obsolete and controversial Act definitely is also against the very spirit of the law itself. Moreover, the fact that Judge Leibell in his Opinions and the Respondent in his Brief completely ignore the main issue involved, i.e., the unalienable rights given to every human being without exception by God, THE SUPREME LAW, shows that both are either godless men who not believing in a Supreme Being reject the American Purpose proclaimed in the Declaration of Independence, the First Law of the land, or that they are hypocrites who ignore the cardinal point because they feel in their hearts or suspect in their heads that this Petitioner is right and his argument sound. Convention says that it isn't good taste to talk about religion. This sort of evasion is nonsense. Religion is the most important thing in the world. People either act according to its teachings (and precious few such people are), or they betray them. Nearly every issue in life, when boiled down to its essentials, is a moral and religious one.

(16) The Appellate Court says that Ludecke argues "that due process of law guaranteed by the Fourteenth Amendment to the Constitution entitled him to a judicial

hearing" (R. 36). Here the Honorable Court errs. Petitioner based his right to a judicial hearing, first, on the very law allegedly authorizing arbitrary procedures, namely on Section 23 of the Alien Enemy Act of 1798; second, on his constitutional rights, that is, on Article V of the Ten Original Amendments, the so-called Bill of Rights; and third, on his unalienable, inherent natural rights given to all men, be they citizens, aliens, or alien enemies, by a source of law more fundamental than any party or majority or any human institution, ~~as~~ the Declaration of Independence proclaimed, the First Law of the land, which however inadequately is incorporated as the Bill of Rights in the body of the Constitution of the United States, and in one way or another either as "Declaration of Rights" or "Bill of Rights" in the bodies of all the constitutions of the states, except New York (R. 1 and 4; also A. 106, 107, 124, 125).

In conclusion, it must be emphasized that both the District Court and the Appellate Court persisted in the constitutionality of the Alien Enemy Act and of the Presidential Proclamation No. 2655 and persisted in dodging the fundamental issue involved, in spite of the fact that Petitioner insisted throughout, in all his Statements, Arguments and Briefs that it is the principal question, namely, whether or no THE SUPREME LAW, THE LAW OF GOD, recognized and established in the National Law (A. 110), is valid in this Christian land, and whether or not It is applicable to all men and all times, as Lincoln said. That is the Cardinal Point, which must be settled and which the Supreme Court of the United States should settle once and for all.

Questions Presented

The principal question presented is whether this Petitioner, a white man, who like Dred Scott, a black man,⁶ is a human being, on account of this undeniable fact has unalienable, inherent natural rights, valid in war and peace, because all human beings, exclusive of race, color or creed, that is, without exception, have these unalienable rights, valid at all times, based on self-evident truths recognized as such in 1776, reasserted and reaffirmed in the American Civil War and this Second World War.

This central fundamental question leads to the following subsidiary questions:

(1) Are these unalienable rights valid in time of peace and in time of war, because they are God-given inherent natural rights, therefore unalienable rights "applicable to all men and all times," as Lincoln said?

(2) Is Natural and Moral Law superior to human law, at any time and under any circumstances, and if, should Divine Law always, in time of peace and in time of war, supersede the human law if contrary to this?

(3) Are all people, residing within the boundaries of the United States of America, be they citizens, aliens or alien enemies, members of the human race? And if so, should the unalienable rights of so-called alien enemies be protected in time of peace and war on the basis of existing valid American National Law, i. e., the Constitution of the United States, first, because of the fact of the self-evident truth that all men, exclusive of race, creed or color, without exception, have unalienable rights inherent in us by birth, and second, because of the fact that these natural rights

⁶ *Dred Scott v. Stanford*, 19 Howard 393 (1857); see (A. 108-9).

are incorporated however inadequately, in one way or another, in the body of the Constitution of the United States and in the constitutions of all the states except New York?

(4) Should American National Law, that is the Constitution of the United States, whenever in conflict with the Divine Law written into the heart of man, be amended and brought into harmony with the Divine Law?

(5) Should a statute of American national law, if casuistic interpretation and its practical application are conflicting with Divine Law, be null and void *per se*, or should it be valid and practically applied simply because immature casuists maneuvered into the seat of public servants and abusing the power entrusted to them by the people choose to persist in its constitutionality on the basis of twisted letters of the law? In other words, should fundamental questions of right and wrong be resolved by the unsound and loose reasoning of cheap opportunists and immature quibblers, selfish politicians and hate-mongers, rather than on the sound and solid ground of moral reason inspired and guided by Divine Law written into the heart of man?

(6) Is the Alien Enemy Act of 1798 (50 U. S. C. 21-24) a Whole which should be interpreted and practically applied as a Whole, because each Section, that is, 21, 22, 23, and 24, is a part of the Whole which together make the Whole? Or can anyone of the four Sections be treated as a separate and independent unit without regard to the whole, interpreted and practically applied at will by irresponsible public servants, even if their arbitrary action is not only contrary to Divine Law but also violating the purpose and the spirit of the very Act itself?

(7) Is the said Alien Enemy Act constitutional and in harmony with Divine Law if applied as a whole, because Section 23 prescribes due process of law? And is it uncon-

stitutional and contrary to Divine Law if applied without due process of law by ignoring Section 23, because it would involve the violation of the constitutional and natural unalienable rights of the victim as happened in the instant case of this Petitioner, who was brutally deprived of his Liberty and all that implies and of his pursuit of Happiness and all that implies for nearly six years and five months without due process of law, and now is ordered deported and exposed to even more internment and persecution, misery and hardships in Germany, branding him with the infamous stigma—"dangerous to the public peace and safety of the United States" for no good reason whatever and without due process of law?

(8) Is it constitutional and in harmony with the Divine Law to ruin an honest man's married life and livelihood by depriving him of his liberty and pursuit of happiness, and after staging farcical hearings as window-dressing for the public to order the deportation of this law-abiding man of goodwill deemed to be "dangerous" on the basis of pure fraud, that is, on the basis of alleged but not existing evidence or fabricated evidence unknown to him, as happened in the instant case of this Petitioner, who is not only *not* dangerous but a constructive member of society and a decent legally admitted resident since 1927, of whom three respected Circuit Judges unanimously declared that "on the face of the record it is hard to see why the relator should now be compelled to go back"? Whose accomplishments are a matter of record and who according to the sworn statements of six loyal, responsible and distinguished Americans positively is worthy of the privilege of American citizenship? (A. 80, 84, 88, 90, 133, 134.)

(9) Is it constitutional and in harmony with Divine Law to apply the Alien Enemy Act but ignore Section 22, which provides for voluntary departure from the United States,

and even ignore the very Order of removal, signed by the Attorney General himself, which says that only "in the event the said alien enemy fails or neglects to depart from the United States within the thirty days, the Commissioner of Immigration and Naturalization is directed to provide for the alien's removal to Germany," and to order this Petitioner's deportation against his will to Germany, when as a matter of fact and of record this Petitioner did not neglect to make arrangements for his voluntary departure to Latin America but found, that it was physically impossible to do so within the allotted thirty days, a fact well known to the authorities, because they had taken good care to make it so?

(10) Is the status of "a declared war between the United States and any foreign nation or government" as stated in the opening sentence of Section 21 of the Alien Enemy Act, i. e. in this case, the status of a declared war between the United States and the functioning German Government or the existing German nation between December 11, 1941, the date of Germany's declaration of war, and May 8, 1945, the date of Germany's unconditional surrender, the same in the sense of the Alien Enemy Act and in the light of International Law as the status of a merely technical state of war between the existing United States and the no longer existing German nation or government, especially after the cessation of actual hostilities?

(11) If the status of a declared war is *not* the same as the status of a merely technical state of war, and if the status of an existing and legally recognized nation or government is *not* the same as the status of a no longer existing and legally recognized nation or government, is it not then that the practical application of the Alien Enemy Act of 1798 (50 U. S. C. 21-24) as well as the Proclamation of the President, No. 2655, dated July 14, 1945, acting under the author-

ity of the said Alien Enemy Act, are illegal acts, therefore null and void, because they are not within the law of the said Act itself in view of the fact that the said Presidential Proclamation 2655 was made sixty-seven days after Germany's unconditional surrender, that is, after the dissolution of the German nation as an organized and legally recognized body politic, thus changing the status of an existing nation or government to a no longer existing nation or government, especially after the President's Proclamation 2714 of December 31, 1946, terminating the period of hostilities of World War II?

(12) Considering these irrefutable facts and unanswerable conclusions implied in the foregoing questions, is it lawful after the cessation of actual hostilities to still apply the Alien Enemy Act to natives of a not only no longer *hostile* but even no longer existing and legally recognized nation, particularly in the light of Section 21 of the said Act which says that "all natives . . . of the *hostile* nation or government . . . shall be liable to be apprehended . . . and removed as alien enemies," and to even continue to persist in removing them and on top of that without due process of law in spite of Section 23 of the very same Act prescribing due process of law?

(13) Further, is it or is it not a fact that some employee, or employees, of the Department of Justice has, or have been, and did in the case at bar, arbitrarily and of his or their own initiative or under the influence of some person or persons in-or-outside the Government, determined the question of Petitioner's being dangerous and deliberately evaded the application of the said Section 23 providing for a judicial hearing to determine that decisive question?

(14) Altogether, is not the whole attitude and procedure in dealing with legally admitted decent civilian internees,

men, women and children, a sorry performance indeed, unworthy of this great nation, and the argument offered a paltry and dolose argumentation on the part of the "Government," that is, in point of fact on the part of some employee, or employees, of the Department of Justice, who sailing under color of authority of the Government of the United States of America jeopardize not only the prestige of the high office they are supposed to serve, but also the prestige of the President of the United States, the Chief of the Nation?

In other words, is this travesty of justice, this prostitution of duty and office, this cynical contempt of cherished traditions and established values, this criminal abuse of power and totalitarian procedure, all done in the name and for the sake of democracy under color of the authority of the Government, is all this hypocrisy and fraud something to be hushed, shielded and affirmed by the highest tribunal in this dear land, the Supreme Court of the United States? Or is it something which must be renounced, definitely and categorically, for all the world to hear, because it is incompatible with Natural and National Law, with American principles and ideals, with the pledges proclaimed in the Declaration of Independence and the Atlantic Charter, with the unnumbered assurances and lofty words of American Presidents and statesmen, living and dead?

(15) Finally, should there be no heart in law or would it be right that heart should have its fundamental place in law? And should the human law be based on the Eternal Law of God written into the heart of man, therefore justice be the only end that law should serve and seek?

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that Petitioner is *not* entitled to a judicial hearings for reasons stated in *United States ex rel. Schlueter v. Watkins*, and that said reasons are unanswerable.

2. In holding that the Alien Enemy Act has *not* ceased to be operative owing to the unconditional surrender of Germany and the cessation of actual hostilities for reasons stated in *United States ex rel. Kessler v. Watkins*, and that said reasons are unanswerable.

3. In affirming the Order of the District Court dismissing Petitioner's writ of habeas corpus, first, because the Alien Enemy Act calls for no hearing where the removal of the alien enemy is by executive action, and second, because that Act remains effective so long as a state of war exists with the German Nation, as it still does, under the terms of the President's Proclamation 2714 of December 31, 1946.

4. In holding that the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General is not subject to judicial review.

5. In affirming Judge Rifkind's decision in *United States ex rel. Schlueter v. Watkins*, 158 F. 2d 853, and in accepting the decision of the United States Court of Appeals for the District of Columbia in *Citizens Protective League v. Clark*, 155 F. 290, 295, 2d, which both sanctioned the Government's illegal procedure and untenable interpretation and wrongful application of the Alien Enemy Act and of the Presidential Proclamation 2655 of July 14, 1945.

6. In failing to deal with and thus ignore the principal question involved, which Petitioner has insisted throughout

his legal battle is the cardinal point at issue, namely that he being a member of the human race therefore is entitled to a judicial hearing, because every human being, exclusive of race, color or creed, has unalienable inherent natural rights, which are valid in time of peace and in time of war.

7. In failing to reverse the judgment and release this Petitioner or, in the alternative, to reverse the judgment and order a judicial trial with due process of law.

ARGUMENT

Reasons for Reversing the Judgment of the Court Below

1. The facts show beyond dispute that Petitioner did not have a fair hearing, and that the alleged evidence, that he is "dangerous to the public peace and safety of the United States" and therefore subject to removal, does not exist, as demonstrated in this Petition and in the papers submitted in the Transcript of Record and Appendix.

2. The fact that Petitioner is entitled to a judicial hearing on the basis of Natural and National Law as well as the Alien Enemy Act itself is an established irrefutable fact, as demonstrated in this Petition and in the papers submitted in the Transcript of Record and Appendix.

3. The actual application of the Alien Enemy Act and the ordered application of the Proclamation of the President, No. 2655, dated July 14, 1945, that is, the internment and ordered deportation of this Petitioner without due process of law, are unlawful, first, because of the two foregoing points, and second, because of the following reasons:

a. The Alien Enemy Act of 1798 (Title 50 U. S. C. 21-24) and the Presidential Proclamation 2655 are constitutional and in harmony with Divine Law and Moral Law if

applied with due process of law, but become unconstitutional and contrary to Divine and Moral Law if applied without due process of law.

b. The Government errs in arguing that the Alien Enemy Act and the Presidential Proclamations 2526 and 2655 may be applied without due process of law. Therefore, the said Act and Proclamations are wrongfully applied to the instant case, because application without due process of law is both a violation of the Act itself and of the said Proclamations as well as of Natural and National Law as demonstrated under (2) to (12) of FACTS AND POINTS (B. 6-13).⁷

It should be emphasized at this point, that Petitioner was not lawfully interned and therefore he cannot be lawfully deported under Proclamation 2655 as the same authorizes only the deportation of those previously lawfully interned.

Presidential Proclamation 2526 of December 8, 1941, is the only proclamation, under which the Attorney General could attempt to act in interning German alien enemies. In its premises reference is made in the first paragraph to Section 21 of Title 50 of the United States Code, and the second paragraph reads "And Whereas by Sections 22, 23, and 24 of title 50 of the United States Code further provision is made relative to alien enemies." The sixth paragraph reads as follows;

"All alien enemies shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by sections 23 and 24 of title 50 of the United States Code, and as prescribed in the regulations duly promulgated by the President."

It is Petitioner's contention that the President would not have referred, in the Proclamation No. 2526, to Sections

⁷ Bracketed B with figures appearing in this Petition refers to pages of the text of this Petition.

23 and 24, if he had intended that the Attorney General should have the power to intern alien enemies without judicial determination of the pertinent facts, and that authorizing the Attorney General to cause an alien enemy to be confined in a "place of detention" did not authorize him to intern such alien enemy. In other words, it is Petitioner's contention that the President attempted to give the Attorney General power to detain an alien enemy until a court passed upon the question of whether or not such enemy should be interned at least as to legally admitted residents.

Therefore, Presidential Proclamation 2655, even if valid, only authorized the Attorney General to deport previously interned aliens, and Proclamation 2526, the only proclamation authorizing internment contemplated a judicial hearing under Sec. 23 of Title 50. Such a hearing was not given Petitioner.

Moreover, Presidential Proclamation 2655, even if valid, only authorized the deportation of an alien after he failed to depart after a prescribed period when given the opportunity to do so. When he is held in custody on an order of removal without having been given that opportunity even when on parole to arrange for voluntary departure (B. (9) 27; A. 123, 124, 140-1), his detention is unlawful.

c. Due process of law as required by the Constitution in cases of residents entitles a resident alien enemy to a judicial hearing under Section 23, Title 50, before internment or deportation, said section expressly stating that it is applicable to "any alien enemy resident."

d. Section 24 of Title 50 does not authorize anyone but the United States Marshal to deport an alien enemy and Sections 21, 22 and 23 do not authorize the Attorney General or immigration officials to act in lieu of the Marshal.

e. When Petitioner entered this country he did so as a friendly alien and lawfully resided here as such whereby he

became vested with constitutional rights of which he cannot be divested by subsequent relations beyond his control between the land from whence he came and this country. While it may be argued that those rights are subject to the Alien Enemy Act, that does not mean that the same may be applied in contravention of those rights, when there is no longer any clear and present danger justifying same any more than martial law may be applied in contravention of such rights in the absence of such a danger. It was clearly the intent of Congress, that the Alien Enemy Act be used consistent with such vested rights and, if it was not, an unconstitutional intent to extend the plenary power of government beyond the limits prescribed by the Constitution is ineffective to that end.

f. The right of this Petitioner to remain in the United States, at liberty, after having entered the country lawfully, and resided there permanently for many years, was a valuable and substantial right, and one of which he could not be deprived except, in accordance with the basic principles of Due Process and Natural Justice, under the settled principles of National and International Law.

g. Although Section 21 of the Alien Enemy Act does not expressly require that a native of a hostile nation shall be accorded a judicial hearing before he is ordered to depart from the United States, the right to a judicial hearing thereunder is implied; because there is no such thing, under the Constitution of the United States, as a valid deprivation of property or liberty without according the party affected a judicial hearing; and the Courts will construe a statute, that deals with the liberty and property of a person, as requiring a judicial hearing; also, the language therein that the President shall "provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart," etc., requires a judicial determination,

who shall or shall not, be permitted to reside within the United States. It should be noted too, first, that Section 22 of the Act provides for reasonable time to settle affairs and arrange for voluntary departure; and second, that said Section 22 is referred to in the second paragraph of Presidential Proclamation 2526 and in the third paragraph of Presidential Proclamation 2655. The opportunity to arrange for voluntary departure was not given Petitioner (B. (9) 27; A. 124, 140-1).

h. Internment and ordered deportation of Petitioner without due process of law are flagrant miscarriages of justice, because they involve an arbitrary and unjust use of war powers when actual hostilities have ceased, as demonstrated under (13) to (16) of FACTS AND POINTS (B. 13-24).

4. The Alien Enemy Act was ceased to be operative, first, because of Germany's unconditional surrender which automatically liquidated her Government and terminated her status of a nation; and second, because the President's Proclamation 2714 of December 31, 1946, terminated the war hostilities and thereby *ipso facto* Germany's status of a hostile nation (hostilities are between hostile nations, therefore, after termination of hostilities between the respective nations these nations are no longer hostile nations), which fact in turn terminated the status of German aliens as alien enemies because only aliens of a "hostile" nation can be alien enemies according to Section 21 of the Alien Enemy Act which expressly states that "all natives, citizens, denizens, or subjects of the *hostile* nation or government . . . shall be liable to be apprehended, restrained, secured, and removed as *alien enemies*." (Italics are Petitioner's.)

5. The Alien Enemy Act does not and cannot remain effective because of a merely technical state of war so construed

by the said Presidential Order 2714 for expediency's sake on whatever valid or invalid grounds, for under no circumstances is such a merely technical state of war between the existing United States and a non existing German nation or Government the same as "a declared war between the [existing] United States and any [existing] foreign nation or government" in the sense intended in this quoted stipulation in Section 21 of the Alien Enemy Act.

Also, it is too clear for dispute, that Germany's unconditional surrender and all that involved and signified not only terminated the status of the German Government as a recognized and even no longer existing executive body, but also the status of the German people as a recognized and even no longer existing nation, and that *de jure* and *de facto*.

Therefore, on the basis of these last two points, 4 and 5, alone, the application of the Alien Enemy Act to the instant case now is a violation of that very act both in letter and in spirit. If there is still a state of war between the United States and people now living in the geographical area from whence Petitioner came, then it can only be with the American military dictatorship in the American zone, with the British Military dictatorship in the British zone, with the French military dictatorship in the French zone, and with the Russian military dictatorship in the Russian zone, but certainly not with a no longer existing German nation.

By its unconditional surrender and the abolition of its last national government, by its mutilation and division into four zones, each of which is occupied by foreign armies and absolutely under foreign control, Germany has ceased to exist as a sovereign state, subject to international law, and has ceased to exist as a compact nation as understood in Section 21 of the Alien Enemy Act. By the Declaration of Berlin of June 5, 1945, the United States, France, the

United Kingdom and the Soviet Union assumed sovereignty over the former German territory and its population. They still exercise their joint sovereignty through the Control Council, the legitimate successor to the last government of Germany. Hence the argument that there still is a state of war with a non-existing German nation is mere false pretense for the exercise of arbitrary power in contravention of vested natural and constitutional rights and in violation of the Alien Enemy Act itself; therefore, the continuance of the exercise of such tyrannical powers is un-American and dishonest, illegal and a great threat to the American Way of Life, compared to which any alleged danger from this Petitioner is infinitesimal.

6. The ordered deportation of Petitioner is contrary to the dictates of humanity and contrary to the new policy regarding the German people officially abolishing the policy of hate, as it is contrary to natural, national and international law, and under the present conditions and circumstances in Germany would mean further internment, persecution and hardships, thus inflicting cruel and inhuman punishment on Petitioner for no good reason whatsoever.

7. The Appellate Court refers in his Opinion in the instant case (R. 36) to his Opinion in the *USA ex rel. Kessler v. Watkins*, and in that one to the Opinion of the United States Court of Appeals for the District of Columbia and to his own decision in *USA ex rel. Schlueter v. Watkins* affirming Judge Rifkind's Opinion who in turn refers to and quotes from the above mentioned Opinion of the United States Court of Appeals for the District of Columbia in *Citizens Protective League, et al., v. Tom C. Clark, Attorney General of the United States*. After studying these Opinions it would appear that the last two are accepted as the most important precedents to rely upon.

Judge Rifkind in his Opinion in *USA^b ex rel. Schluter v. Watkins*, Civ. 35-681, 67 F. Supp. 556, says that:

The case presents for decision four questions.

1. Do the relevant congressional enactments and the proclamations and regulations issued thereunder authorize the Attorney General to remove the relator from the United States?

2. If so, are these statutes consonant with the Constitution?

3. If so, is the order upon which relator is detained nevertheless insufficient to justify the detention and the subsequent removal because it was the end product of a proceeding from which the indicia of "due process" were absent?

4. To what extent may the courts review the action of the executive in ordering the removal of an enemy alien?

The questions will be treated in the order stated.

Petitioner believes that the first question already is settled beyond dispute, namely that the Attorney General is authorized to remove the relator only on the basis of due process of law; that the second question already is settled beyond dispute, namely that these statutes are consonant with the Constitution only if applied on the basis of due process of law; that the third question logically is also settled already beyond dispute that under no circumstances said Order justifies Petitioner's further detention and subsequent removal without due process of law; and finally, that the fourth question also is already settled beyond dispute, because it is unlawful of the executive to order the removal of an alien enemy without due process of law.

Special attention, however, is called to two statements made by Judge Rifkind in answering the second question quoted above. The first statement reads as follows:

"That the United States, despite cessation of hostilities, is still at war with Germany has been authoritatively settled. (*Citizens Protective League v. Clark*, *supra*, at p. 295;")

Here is what Judge Prettyman has to say regarding the above quoted point in his Opinion in *Citizens Protective League v. Clark*, 155 F. (2d) 990 (App. D. C.):

"Unreviewable power of the President to restrain, and to provide for the removal of, alien enemies in time of war, is the essence of the Act. [This, of course, is merely an opinion of Judge Prettyman, which should not be looked upon as an unbreakable precedent, for it definitely is a violation of the act, in letter and in spirit.] The comment of the authorities we have mentioned has been directed to that feature. Chief Justice Marshall said, 'The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself.' However jealously we may guard the civil rights of all residents within our borders, neither those considerations nor the 'dictates of humanity and national hospitality' can be permitted to impinge upon the overriding necessities of the power to wage war successfully." The President not only has the power, under the broad grants by the Congress, but has the solemn responsibility to make certain that the conduct of war is not only unimpeded but suffers from no threat of impediment. 'Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by these branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.'²¹ As a practical matter, it is inconceivable that

before an alien enemy could be removed from the territory of this country *in time of war*, the President . . ."

The significance of the text quoted above is obvious, that is, Judge Prettyman's own words and those quoted by him. "To wage war successfully" and "the responsibility of war-making"—the very terms used in the *Hirabayashi* case judged in 1943 (see footnote 20 in quoted text on previous page), that is, in time of actual warfare,—refer to active war with actual hostilities and not to a merely technical state of war without actual hostilities. Thus, "in time of war" and the "conduct of war" to quote Judge Prettyman's own words can only mean active warfare with actual hostilities and not merely a technical state of war without actual hostilities, apart from the fact that the term "conduct of war" clearly signifies active warfare with actual hostilities.

Therefore, Judge Rifkind's statement "That the United States, despite cessation of hostilities, is still at war with Germany has been authoritatively [!] settled. [!] (*Citizens Protective League v. Clark, supra*, at p. 295)," is a frivolous statement. Nothing has been "settled" of the sort, and certainly far from "authoritatively", because the principal precedent referred to, the case of the *Citizens Protective League v. Clark*, only speaks of active warfare, etc., and not even suggests a merely technical state of war without hostilities. Hence, the Hon. Frank, Circuit Judge, in his Opinion in *USA Schleuter v. Watkins*, 158 F. 2d 853, is on very thin ice indeed when he states that "The facts are fully stated in the excellent opinion of District Judge Rifkind" and that "We agree with Judge Rifkind, and with Judge Prettyman's opinion in *Citizens Protective League v. Clark* . . ."; and the Hon. Augustus N. Hand, Circuit

²⁰ *Hirabayashi v. United States*, 320 U. S. 81, 93, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943).

²¹ *Ibid.*

Judge, is making a bold statement when he says that "In both decisions we reached conclusions contrary to the relator's contentions and for reasons which seem to us unanswerable (R. 37) after referring to his own opinion in *USA ex rel. Kessler v. Watkins*, in which he refers to the above mentioned *Schleuter v. Watkins* and *Citizens Protective League v. Clark* cases, which in this instance at least are incompetent, irrelevant and immaterial precedents. To rely upon precedents, when the question of life and death is involved, particularly on invalid precedents such as these, is very serious business indeed, and as Lincoln said, "Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the states can be considered as well as settled." (Speech at Springfield, Ill., June 26, 1857.)

This leads to the second statement Judge Rifkind made at the end of his answer to the second question quoted above (P. 37) which reads as follows:

"True, the Supreme Court has never directly passed on the constitutional validity of the Alien Enemy Act. But in the light of the long history of the statute, the broad base of constitutional power from which it springs, the uniform recognition which has been accorded the statute as valid whenever occasion has arisen, and the decision of *DeLacey v. U. S.*, C.C.A. 9, 1918, 249 Fed. 625, 626-8, and *Citizens Protective League v. Clark*, the question for this Court, is settled in favor of constitutionality."

However, the question involved is *not* the constitutional validity of the said Act as such and as a whole, but the valid or invalid interpretation of that Act. And there can be no doubt, that the interpretation and practical application adopted by the "Government" and approved by Judge Rifkind *et al.*, is not only a violation in letter and in spirit

of the very Act itself, but also of Natural Law and National Law, the Constitution of the United States, therefore invalid.

Moreover, it must be emphasized again, that there is not now a declared state of war between the United States of America and the country of which the Petitioner once was a subject, because hostilities have ceased ever since May 8, 1945, because said nation and government no longer exist as shown above, and that there is no longer any clear and present danger to the peace and safety of this country justifying the substitution of the executive for the judicial determination of the question of whether Petitioner is dangerous and should be removed.

In view of the fact that the difference between the status of a declared war with active warfare and the status of a merely technical state of war without actual hostilities is also an important and interesting question of International Law, a decision of the Supreme Court of Justice of Chile is significant. The following is a verbal translation of a UP report published in the Spanish paper *La Prensa* in New York City of July 3, 1947. It reads as follows:

SANTIAGO, Chile, July 2 (UP).—The Ministers of the Government, the Foreign Affairs, Economics and Education, who are also members of Congress, are confronted today with the alternative to give up either their cabinet posts or their seat in Congress, owing to a decision of the Supreme Court of Justice.

The Tribunal established that the state of war with Japan was terminated with the unconditional surrender of this country in 1945, even though no peace treaty had been signed. It was the state of war, which made many political combinations possible. For instance, only in actual war time could Senators and Representatives hold executive positions at the same time.

So it came, that Alfredo Rosende, Raúl Juliet, Luis Bossay and Alejandro Ríos—all of them members of

the Chamber of Deputies—could keep their respective cabinet posts . . .

The four belonged to the majority and radical party and their resignations from the cabinet may cause a great political crisis.

The decision of the Supreme Court of Justice was rendered in the case of the conscript José Garate, of the artillery regiment at Tacna, who was accused of having murdered the civilian Manuel Mena on March 30th.

A civil judge in Buin . . . declared that Chile still being technically in a state of war with Japan only the military judges were competent to judge a Garate. The military judges did not agree and therefore asked the Supreme Tribunal to decide who should judge a Garate.

The Supreme Court determined that the idea of the military tribunal was that they should exercise their extraordinary powers solely in time of war and that there did not exist a state of war owing to the fact that the hostilities with Japan ceased in 1945.

It may be of interest also to quote here significant parts from a remarkable DECISION OF THE SUPREME COURT in Buenos Aires on August 21st, 1946, *re* a Writ of *Habeas Corpus* presented by the attorney Octavio A. Rivarola, Buenos Aires, Argentina, in favor of Juan Sigfredo Becker and others, apparently German aliens and legal residents, who had been arrested and detained for expulsion. The significant excerpts of this Decision are the following:

WHEREAS the alien, once residing in the country, has the same established rights and enjoys the same guarantees as the nationals. Article 20 of the National Constitution states so expressively in terms that are not necessary to quote, and this is confirmed by the declarations of rights and guarantees referring in all cases to residents. This does not mean, of course, that an alien whose activities are dangerous, endanger the security of the Nation or disturb the public order, cannot be deported. . . . That, therefore, the resident alien, though he may be expelled when his conduct makes him

dangerous, is nevertheless protected by the constitutional guarantees by which all are covered against any arbitrary act and by which it is established that nobody may be punished without preceding trial, nor removed from the jurisdiction of judges, designated by the law, before the litigation of the case, that the defense of the person and his rights cannot be violated. (Article 18 of the National Constitution.) There are guarantees of an essentially judicial character, which, in the system of division of powers, were adopted by the Constitution in order to protect the subjects against all abuses, and which belong to the competence of the Judicial Power, exercised, according to article 94 of the Constitution, by a Supreme Court and other lower courts which the Congress may establish. It is this power, which, in each particular case, decides and determines the rights, punishes and protects the resident against the misuse of force and arbitrary action.

This is confirmed by article 95, establishing that, under no circumstances, the President of the Nation may exercise judicial functions, arrogate to himself an intervention in cases pending and reopen closed ones. It has been said that the expulsion is not a punishment, but this conclusion is difficult to sustain. It will not be a specific punishment as those established in the Penal Code until today, but in a general sense, it is a punishment, since the expulsion of an alien, who has established his family in the country, has made there his living, has acquired property, implies to make him suffer for his conduct, and that is a punishment. This is the concept of the term "punishment" in article 18.

It cannot be otherwise, because, take the reverse case, it would be enough that a new law might cross out of the Penal Code one of the established penalties so that the Executive Power might apply that penalty for its own end, which is absurd and which would lead to the loss of liberty and to tyranny. Even if it would not be so, the expulsion, under all circumstances, amounts to the loss of a right established by the Constitution, and its loss can be imposed only by judicial proceedings, after

due process of law, where the alien the same way as the national, may defend himself against charges brought against him, may prove their falsehood, his good conduct, all this before jurisdictionally competent, independent and fair judges who are remote from the passions of the moment and who have no other guide but the Constitution and the law, and no other aim but Truth and Justice.

The violation of these constitutional principles by the law 4144, attributing to the Executive Power the authority to expel all aliens whose conduct, according to its judgment, endangers the National security or disturbs the public order, is evident, and for this reason this Court in its capacity as the ultimate interpreter of the National Constitution, the supremacy of which it is called to maintain, is forced to declare it as such. . . .

Therefore, the sentence appealed to is revoked as far as it may have been the object of the extraordinary writ, and the relators should be set free.

ANTONIO SAGARNA

B. A. NAZAR ANCHORENA

(in dissidence with the reasoning)

FRANCISCO RAMOS MEJIA

T. D. CASARES

(in dissidence with the reasoning)

Dissidence with the Reasoning:

With the detention referred to, the Executive Power would do something that it could do only under a state of siege, and even then, only under the provision that the detainee does not prefer to leave the country voluntarily (Article 23).

Considering the ordinary duration of local proceedings, the alien, whom the Executive Power deprives by its own actions of his liberty during the trial, will suffer de facto, a punishment without the Executive

Power having the authority to impose it and without a law authorizing such procedure.

THEREFORE, the decision of the Court of Appeals is herewith revoked, on these grounds, in so far as it has been the object of this extraordinary writ, and relators are ordered to be set free.

B. A. NAZAR ANCHORENA,

T. D. CASARES.

8. It is an undeniable fact that attitude and procedure of the "Government", that is, some person or persons employed in the Department of Justice unknown to Petitioner who are acting on their own or under the influence of some person or persons in-or-outside the Government, in connection with the case at bar as well as with other cases of so-called dangerous alien enemies, are not only incompatible with established Natural and National Law and the Alien Enemy Act itself, but definitely also with only recently announced policies and convictions of the highest office-holders representing the American Government, therefore contrary to and sabotaging will and work of this very Government. The wide discrepancy, for instance, between all the lofty talk about human rights and the integrity and the dignity of the individual on the one hand, and on the other, the bitter reality, in the instant case, the arbitrary and brutal, totalitarian and irresponsible, treatment of this Petitioner is indeed as astonishing as it is alarming, because it apparently is symbolic of certain frauds, developments and trends, which remain unchecked despite the pledge in the Atlantic Charter, that all men in all lands were to be assured of living out their lives "in freedom from fear and want."

Of the mass of evidence of such binding declarations and statements as well as revealing accusations tending to support his view, Petitioner offers a few of the significant ex-

cerpts which are self-explanatory. We begin with the statements of some well-known Senators, who are not ashamed to protest injustice and dishonesty with equal passion, whether it occurs at home or abroad.

Said the Hon. William Langer, Senator of North Dakota and chairman of the Senate Committee on Civil Service, who was twice Attorney General and twice Governor of his state, on July 28, 1947, in A CALL TO ACTION:

Unless you wake up you will find yourselves helpless. As of today millions of soldier boys and possibly any girl in World War II who trusted you to preserve democracy at home, while hundreds upon thousands lost their lives or came back blind, insane or maimed, now find no hope for a return to the way of life they left to fight for the preservation of America and its freedom.

My friends, our enemies are organized. They know neither race, color, nor creed. They are interested in money and profits and in ruling you. To them the word "democracy" is a joke. To them a Republican or a Democrat or a Socialist is all right if he plays their game.

You, and not the politicians, will decide whether patriotic lovers of America shall run this country, or whether it shall be governed by a horde of bureaucrats, none of whom you elected.

And in his letter To My Patriotic American Friends:

Time and time and time again upon this floor I have asked the administration to reverse entirely the Morgenthau occupation plan for Germany. His idea of tearing down and destroying all of the industrial plants of the most industrialized area of Europe and turning them into agricultural fields and pastures means starvation, hunger, want, and suffering to the millions in Germany and in Europe as a whole.

Millions of good, loyal, honest, fine, patriotic American citizens are relatives of those millions. . . . They

agree that the inhuman Morgenthau plan has resulted in chaos, hunger, want and suffering—all at an added cost to the taxpayers of the United States. And, Mr. President, although the war has been over for two years, we find millions of Germans still being tried in denazification courts, hundreds of thousands of them unable to get a job and held in concentration camps until they have been denazified. And we find this at a time when our Department of State and War Department are agreed that the United States must make friends with a new Germany and Austria if our influence is to mean anything in Europe.

(Congressional Record—Proceedings and Debates of the 80th Congress, First Session.)

Said the Hon. Homer E. Capehart, Senator of Indiana, in the Senate of the United States on February 5, 1946:

Mr. President, the alleged "peacetime" policies of this administration have degenerated into a deliberate face-saying fraud. The fact can no longer be suppressed, namely, the fact that it has been, and continues to be, the deliberate policy of a confidential and conspiratorial clique within the policy-making circles of this Government to draw and quarter a nation now reduced to abject misery.

In this process this clique, like a pack of hyenas struggling over the bloody entrails of a corpse, and inspired by a sadistic and fanatical hatred, are determined to destroy the German nation and the German people, no matter what the consequences. (C. Record—of the 79th Congress, Second Session.)

If that is true, and it most probably is, more or less, it explains also the otherwise inexplicable and unbelievable treatment of the helpless civilian German internees branded as "dangerous alien enemies."

Said Senator Taft in his Tacoma Address declaring United States Foreign policy a failure:

I do not see how we can hope to secure permanent peace in the world except by establishing law between

nations and equal justice under law. . . . Our general attitude has been one of policy and expediency instead of law and fair dealing. Again I believe this attitude derives from the domestic policy of recent years which has proposed to turn over all discretion to deal with any serious problem to administrative boards unrestrained by definite statutes and unrestrained by court review. That domestic policy derided a government of law, and glorified a government of men unrestrained by law or justice to individuals. (New York Times, September 26, 1947.)

Said the President of the United States in his address at Monticello, home of Thomas Jefferson, on July 4, 1947:

The Declaration of Independence was an expression of democratic philosophy that sustained American patriots during the revolution and has ever since inspired men to fight to the death for their "unalienable rights."

A second requisite of peace among nations is common respect for basic human rights. Jefferson knew the relationship between respect for these rights and peaceful democracy. We see today with equal clarity the relationship between respect for human rights and the maintenance of world peace. So long as the basic rights of men are denied in any substantial portion of the earth, men everywhere must live in fear of their own rights and their own security.

The life of Thomas Jefferson demonstrates, to a remarkable degree, the strength and power of truth.

He believed, with deep conviction, that in this young nation the survival of freedom depended upon the survival of truth.

So it is with the world.

As the spirit of freedom and the spirit of truth spread throughout the world, so shall there be under-

standing and justice among men. (New York Times, July 5, 1947.)

Said the President of the United States in his letter of August 6, 1947, to Pope Pius XII:

I desire to do everything in my power to support and to contribute to a concert of all the forces striving for a moral world.

• • • • •
These moral aspirations are in the hearts of good men the world over . . . [who] can unite their efforts for the preservation and support of the principles of freedom and morality and justice . . .

Your Holiness, this is a Christian nation. More than a half century ago that declaration was written into the decrees of the highest court in this land. . . .

I believe that the greatest need of the world today, fundamental to all else, is a renewal of faith. I seek to encourage renewed faith in the dignity and worth of the human person in all lands, to the end that *the individual's sacred rights*, inherent in his relationship to God and his fellows, will be respected in every land. We must have faith in the inevitable triumph of truth and decency; . . .

. . . I believe with heartfelt conviction that those who do not recognize their responsibility to Almighty God cannot meet their full duty toward their fellow men.

Said the Pope in his answer, dated August 26, 1947, inter alia:

Truth has lost none of its power to rally to its cause the most enlightened minds and noblest spirits. Their ardour is fed by the flame of righteous freedom struggling to break through injustice and lying. But those who possess the truth must be conscientious to define it clearly when its foes cleverly distort it; bold to defend it and generous enough to set the course of their

lives both national and personal by its dictates.
(N. Y. T. Aug. 29—47.)

As much as any event that clouds the atmosphere this unusual correspondence is also a sign of crisis, the crisis of thought throughout the world leading to one catastrophe after another. It is well to listen also to the following statement of the Pope, the papal father of many millions of American men, women and children:

Likewise, much was said of the state of liberty which was to have been another perfect fruit of victory: liberty triumphing over despotism and over violence. But this cannot flourish except where justice and law command and efficaciously secure the respect for individual and collective dignity.

Meanwhile the world is still waiting and pleading that justice and law create stable conditions for man and society. In the meantime, millions of human beings continue to live under oppression and despotic rule. For them nothing is safe, neither home, nor goods, nor liberty, nor honor; thus the last ray of happiness, the last spark of courage, dies in their hearts.

In our Christmas message of 1944, addressing a world full of enthusiasm for democracy and eager to be its champion and proponent, we expounded the main moral requirements for a right and healthy democracy. Today not a few fear that the hope placed in that order has diminished, owing to the striking contrast between democracy in words and the concrete reality. (N. Y. T. June 3—47.)

Said David Lilienthal, Chairman of the U. S. Atomic Energy Commission in his widely publicized and acclaimed statement to the Congressional Atomic Committee answering the charge of Senator McKellar of Tennessee that he has Communistic leanings:

I believe—and I do so conceive the Constitution of the United States to rest upon, as does religion

—the fundamental proposition of the integrity of the individual; and that all Government and all private institutions must be designed to promote and to protect and defend the integrity and the dignity of the individual; that that is the essential meaning of the Constitution and the Bill of Rights, as it is essentially the meaning of religion.

There are always witch-hunters and people who will gladly defame and assassinate the character of others without responsibility. That is why we have courts, and that is why we have rules of evidence. (N. Y. Times, February 5, 1947.)

Said the Chief Justice of the Supreme Court of the United States, the Honorable Fred M. Vinson, addressing the American Bar Association in Cleveland on September 22, 1947, after he declared that the most striking evidence of the confusion of the present was the misconception of the nature of man:

Under this view, man is a mere automaton incapable of sharing in the determination of his own destiny, bereft of dignity, capable of responding only to the grosser of materialistic motivations and irrational passions.

That such a creature is incapable of exercising the high privilege of self-government is obvious. Essentially this conception of the nature of man underlies all of the totalitarian doctrines of our day and, unfortunately, it underlies the thinking of some in our own midst who shrink from its inevitable and logical conclusion.

This conception contains the seeds of destruction. We must resist it and prove it fallacious.

After asserting that a world of peace and mutual understanding must be based on law and order, and that lawyers had been made disturbingly aware of a growing lack of faith

and respect for law and the legal process, the Chief Justice continued:

But the challenge to the supremacy of the law has not been confined to the totalitarian regimes. In our own country we have seen evidence that there are those who have failed to realize that the only alternative to the supremacy of law is anarchistic chaos, or the reign of a personal dictator. (N. Y. Times, September 23, 1947.)

Said Justice Wiley B. Rutledge in his dissenting Opinion in the Supreme Court on March 6, 1947, on the John Lewis case:

No right is absolute. Nor is any power, governmental or other, in our system. There can be no question that it provides power to meet the greatest crises. Equally certain is it that under "a government of laws and not of men" such as we possess, power must be exercised according to law; and government, including the courts, must move within its limitations. . . . No man or group is above the law. All are subject to its valid commands. So are the Governments and the courts. (New York Times, March 7, 1947.)

Said Justice Robert H. Jackson of the Supreme Court of the United States at the centennial convocation of the University at Buffalo on October 4, 1946, after condemning Nazi lawlessness and persecution and imprisonment of individuals and minorities without judicial inquiry:

. . . Like other countries, we have bigotry and intolerance among majorities and minorities in our society and regrettable incidents as a result. But oppression is not an official policy of the Government and never can constitutionally become such because we have placed limitations on the measures which any majority or any official of a State or a Federal Government can take against an individual or a minority.

We have created personal rights which exist not by grace of any current administration but as matters of

law. We have imposed upon every popular or legislative majority certain denials of power, and these constitute the protections for our individuals and minorities—not always complete, but certainly of great value. The enforcement of these restraints are entrusted to our courts, courts independent of the Executive and Legislature, courts not subject to popular choice, popular removal, or popular review. (N. Y. Times, October 5, 1946.)

Said the Attorney General Tom C. Clark, on September 15 in Washington addressing a national conference of Federal attorneys, that aliens engaged in communistic activities had no place in this country. He cautioned, however, that democratic principles must be observed in wiping out the "termites" . . . (N. Y. Times, September 16, 1947.)

And on September 28 in Cincinnati at the National Exchange Club's convention, he pledged a continuing war on Communists, Fascists and other subversive groups. Further, Mr. Clark promised that:

We shall not permit the entry into our country of any person for residence of *any person* who does not believe in our form of government. We shall deport every alien whose action contravenes our statutes and thus deprives himself, under our law, of the precious privilege of American security.

But we shall do this in the American way, in a legal orderly manner. We shall not use Gestapo tactics of a Hitler or destroy the very institutions of liberty and justice that we have fought so hard to preserve.

Those who deny freedom to others cannot long retain it for themselves—and under a just God they do not deserve it. We must share our freedom—exchange it—with others, lest we shall lose it entirely.

The only strong, permanent state is the one which places all men on an equality before the law. Our way of life is founded on basic freedoms. It remains on the foundation rock of religion. Today the choice is simple

—shall we live in world brotherhood or in world chaos?
(N. Y. Times, Sept. 29-47.)

And in the struggle for justice as a world force, the theme chosen for the Fifteenth Annual Forum On Current Problems of the New York Herald Tribune, on November 2, 1946, at the first session on "Justice For All" the Attorney General of the United States of America said *inter alia* the following:

... ideals are of little worth unless they become living facts. The ideals of democracy and the actual living of them must be brought into harmony. Although the march toward full democracy has been long and difficult, it is not yet completed. It will be completed only when a living and growing America, full of promise, becomes an America in which the promise is fulfilled—a land of justice and opportunity for all. . . .

The ideals of justice for all will not be a living reality so long as the spirit of hate, hypocrisy, intolerance and fear—abiding in the hearts of some Americans—remains. Breeders, spreaders and carriers of hate, whether racial or religious, are un-American and strike at the very heart of the American Way of Life . . .

The enemies of freedom all use the same techniques in their program of destruction. . . . We must not use their methods in our fight for justice for all. We must use the American techniques of due process of law. [!!!]

All races and all colors make up America. All races, all colors, all faiths have helped to make the name of this nation a synonym for liberty to all peoples in the world. We are concerned today with justice for all from the standpoint of minorities. We Americans have an abhorrence at a lynching, at a racial violence, at the misuse or abuse of authority. [!!!—italics are petitioner's.] (New York Herald Tribune, November 3, 1946.)

The last quotation Petitioner served on the Attorney General in a letter of January 14, 1947, (A. 152) but was

never honored with a reply. All Petitioner can add today is that still Mr. Clark's "words and performances are no kin together." Maybe of course that letters written by "dangerous alien enemies" never reach the Attorney General's desk and that the Honorable Gentleman does not know and see what is going on under his very nose in the Department of Justice. Anyway, it is a fact that the FREEDOM TRAIN, containing 131 documents and flags marking the development of liberty in the United States, is sponsored with much fanfare by the Attorney General Tom C. Clark and endorsed by President Truman. In announcing the objectives of the trip, which started in Philadelphia on September 17; the American Heritage Foundation said:

We shall announce as a basic credo that the essence of democracy is the sanctity of the individual. This precious heritage gives dignity to mankind. Men were born to be free; for only free men can walk the earth with dignity. We shall emphasize the fact that our nation holds secure for its people the integrity of the individual and the freedom to aspire to the fullest development of the human personality.

Freedom of enterprise, protection of minorities, rights of labor—and all the rights and liberties we enjoy, under the Constitution and the Bill of Rights—rest upon this doctrine. We believe that no form of totalitarianism will be able to breach the bulwarks of our spiritual defenses as long as our country holds fast to this principle. Our objective is to make this concept the unshakable credo of as many Americans as we can reach through the modern techniques of education, advertising and group action. (N. Y. Times, Sept. 21-47.)

How much an intelligent education and above all how much the good *example from the top down* is needed, may be learned from the candid admission of a good Ameri-

can, who apparently is one of the few, the very few, who does not allow himself to succumb to self-deceit. Listen:

America faces a great ideological crisis, because it has forgotten and neglected the basic principles upon which the foundations of this Republic were laid, Dr. Hardin Craig told the 154th anniversary celebration of the University of North Carolina here today.

Dr. Craig, Professor of English, asserted that if communism or any other totalitarian form of government constituted a threat to democracy, it was because Americans had been ignorant of and indifferent to the principles of democracy.

Dr. Craig said that if this country were to enjoy the blessings of individual liberty, the people must give our political institutions constant attention and constant reformation. "In this matter we in the United States and I think also in Great Britain have been much to blame," he said. "It is possible for our enemies to point with truth to the badness of our political behavior, to our violation of our professed principles, to our neglect, indifference, ignorance and corruption."

(New York Times, October 11, 1947.)

Deliberately, Petitioner quoted Senators, representing the legislative branch of the Government, The President and the Attorney General, representing the executive branch of the Government, and Justices of the Supreme Court, representing the judiciary branch of the Government, which together forming the American Government are endowed with the constitutional authority of power, the division of which the founding fathers knew as a system of "checks and balances."

It is a matter of record, that not only the above quoted but also other members of these three branches of the American Government, in one way or another, in solemn statements publicly acknowledged the validity of American principles, that all men have basic rights, that due process of law is the prerequisite of justice, and so on. Yet, in flagrant

violation of his own words, the same Attorney General signed an Order ordering—under the cloak of legality—the illegal deportation of a decent, law-abiding legally admitted alien resident arbitrarily branded “dangerous to the public peace and safety of the United States” to perpetuate his misery through more imprisonment and persecution in Germany after having deprived him already in this country of his liberty for nearly six years and five months for no good reason whatsoever—and all this without due process of law.

Maintaining a merely technical state of war, without any actual danger, years after the unconditional surrender of the enemy and after all hostilities have ceased, in order to carry on a pretence of a man being dangerous to the public peace and safety because of an alleged and not produced evidence, is, in itself, a fraud and an affront to the American sense of fair play. Because of this and of other facts, already in his *habeas corpus* petition of October 14, 1946, this Relator accused the Department of Justice among other things of fraud and criminal abuse of power (R. 1). For the “Government” to deport him now before giving Petitioner the opportunity to prove the fraud charged against the “Government” itself, would be an act tending to show guilt on “its” part and proof of his charges of fraud against the “Government,” that is, some person or persons employed in the Department of Justice who are unknown to this Petitioner.

9. At this point, attention must be called to the all-inclusive relief bills introduced by Senator W. Langer to stay deportation of 207 German alien enemies at Ellis Island. The Congressional Record of July 21, 1947, page 9633, says:

DEPORTATION OF CERTAIN ALIENS

Mr. Langer: Mr. President, I ask unanimous consent to introduce for appropriate reference a bill to provide

for full and fair hearings before deportation of persons now or hereafter interned under the provisions of the Act of July 6, 1798, and so forth.

There are 207 aliens—Germans—on Ellis Island who have been ordered deported by the Alien Enemy Control Board because of a finding that they are detrimental to the interests of the United States.

It is asserted by many of them that they did not have a full and fair hearing as in other deportation cases.

There being no objection, the bill (S. 1690) to provide for full and fair hearings before deportation of persons now or hereafter interned under the provisions of the Act of July 6, 1798.

And the Bill S. 1709 introduced in The Senate of The United States on July 24, 1947, reads as follows:

To provide for full and fair hearings before deportation or removal of persons now or hereafter interned under the provisions of the Act of July 6, 1798 (Stat. 577), as amended, relating to alien enemies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that no person now or hereafter interned under the provisions of the Act of July 6, 1798 (Stat. 577), as amended, relating to alien enemies, shall be deported or removed without full and fair hearing as in all other deportation proceedings.

However, according to reports from Washington the Attorney General, in a major change of policy, has decided to proceed with the removal of certain "undesirable" alien enemies despite the said bills, because delay of deportations owing to relief bills has been a matter of courtesy, not law.

In connection with the last developments regarding the alien enemies still held at Ellis Island, Petitioner may point to his letter to the acting Director of the Alien Enemy Control Unit, Mr. Charles M. Rothstein, Department of Justice,

Washington, D. C., which speaks for itself. It illustrates the present situation and the attitude of your Petitioner and reads as follows:

Mr. Charles M. Rothstein, Acting Director, Alien Enemy Control Unit, Department of Justice, Washington, D. C.
Kurt G. W. Ludecke, Room ORR, Ellis Island, New York Harbor.

September 15, 1947.

DEAR MR. ROTHSTEIN:

The New York Times of September 11 published on page 55 an AP report from Washington stating that the Department of Justice said that it was investigating the prolonged detention of about 200 enemy aliens at Ellis Island with the possibility of "deporting, paroling or freeing" those not involved in court proceedings; also, that the majority of the internees were interviewed recently by Senator Langer, Mr. Shoemaker and your good self, that further interviews will be held on September 23, and that following these, Messrs. Langer, Shoemaker and Rothstein would make joint recommendations to Tom C. Clark, Attorney General, on disposition of the prisoners.

In view of the fact, that I was one of the interviewed and that soon I am going to submit my certiorari petition to the Supreme Court, which granted my application for a stay of the mandate of the Appellate Court pending the consideration and disposition of said petition, I may be permitted to bring the following to your special attention:

Considering the merits of my case, it seems certain that the Supreme Court will not only accept my certiorari petition for consideration, but will also reverse the judgment rendered by the Appellate Court and the District Court against me or, in the alternative, will reverse the judgments and order a full examination and a public hearing in a proper court according to law, provided of course that the Supreme Court really is supreme, politically free and independent to administer justice without prejudice, and

is, and I trust will ever be, the protector of the fundamental principles of truth and right.

No doubt, that this time truth, reason and right are on my side, for I claim only what is true in the light of Natural and National Law, what is just on the face of the record, and what is right for reasons which seem to me unanswerable.

Though the Appellate Court affirmed the Order of the District Court dismissing my writ, the unanimous Opinion of the Circuit Judges, the Honorable L. Hand, Swan and Augustus N. Hand, is with regard to my person more positive than negative, for inter alia it says:

"Ludecke, the relator-appellant, made an oral argument and submitted a brief, both of which have been interesting and moving.

"We see no reason for discussing the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General for the reason that his order is not subject to judicial review. However, on the face of the record it is hard to see why the relator should now be compelled to go back. Of course there may be much not disclosed to justify the step; and it is of doubtful propriety for a court ever to express an opinion on a subject over which it has no power. Therefore we shall, and should, say no more than to suggest that justice may perhaps be better satisfied, if a reconsideration be given him in the light of the changed conditions, since the order of removal was made eighteen months ago."

Thus, it would appear that this Opinion while suggesting to the Department of Justice a reconsideration of my case at the same time, between the lines, (should the Department of Justice choose not to reconsider) invites me to go to the Supreme Court for a final decision, which has the constitutional power (Paragraph 1 of Section 2 of Article III of the Constitution of the United States) to inquire into the facts of the instant case so as to be satisfied that the issuance of the deportation Order does not involve a violation of my unalienable rights, valid in time of peace and war, nor an

arbitrary and unjust use of war powers when actual hostilities have ceased.

It would be an error to think that I am composing this letter in order to obtain or quasi to force an administrative release. The truth is, that I have been fighting this fight unwaveringly from the very beginning for the fundamental principle involved, not for the sake of my unimportant humble self. I am now approaching you, because it seems to me that an honest man striving for wisdom should always be ready to show his good will, when an opportunity offers itself, as it does in this case, to make it easier for those responsible for the injustice done to me to right the wrong with grace, even though I believe that this fundamental all important case should be aired thoroughly in the interest of justice.

Also (to quote from my Statement read before and left with the Alien Enemy Hearing Board in Chicago at my hearing on January 16, 1942), "it seems to me that the very unfair, unjust treatment, which I have suffered under American jurisdiction, is due to a misunderstanding, to a misinterpretation of my person, of my motives, and of my efforts, rather than to malice. At least, I like to think it is." And still today, after an absolutely unnecessary and unjustified imprisonment of five years and nine months, "I like to think it is," even though I have had to suffer the unending humiliations and indignities of prison life and now am branded a "dangerous" animal subject to removal.

But "blindly the wicked work the will of heaven." For and this I say with joy and satisfaction, instead of breaking me they made me stronger and pushed me closer to God thus helping me not only to win my Battle, the only worthwhile victory, the Conquest of Yourself, but also to develop and secure the only constant real home, the incorruptible, inviolable and indestructible inner Self, that nobody and nothing can profane or take away wherever I may be.

To return to the practical point at hand. The Appellate Court in the above quoted Opinion after stating that "on the face of the record it is hard to see why the relator should now be compelled to go back" observes that "of course there may be much not disclosed to justify the step."

As you well know by now, what your predecessors, the Messrs. Cooley and Ennis, have known all along, there was and there is nothing, absolutely nothing, that could possibly justify my illegal arrest on December 8, 1941, three days *before* there was a "declared war" (see Section 21 of the A. E. Act of 1798) between the United States and Germany, nor my internment for the duration of the war, let alone my deportation with the infamous stigma "dangerous to the public peace and safety of the United States"—that is, perpetuating misery because it means more persecution, more imprisonment and hardships in Germany. I say, there was and there is nothing, for the simple reason that I have never done or said anything on the ground of which any sane and honest man could and would condemn me as a dangerous animal.

And because that is so, practically all the questions put to me at the interview on August 11 with you, Mr. Shoemaker and Senator Langer, in connection with my case, were how old I was and whether I had belonged to an organization.

All else of what was said followed from the dialogue between Senator Langer and myself or from what I chose to say on my own initiative. However, in view of the fact that while waiting outside for my turn I overheard that my file was not in the Ellis Island office, I respectfully suggest that you arrange for my file being at hand at your next visit, supposedly on September 23, and call me again, so that I may explain or clarify to you, Mr. Shoemaker and Senator Langer, should there really be anything that would need explaining, or clarification, in order to clear myself entirely and definitely, once and for all.

At any rate, in the interest of this case, which I repeat is an all important fundamental case because of the fundamental principles involved and which, by the way, has all the stuff to grow into a cause célèbre, I would appreciate indeed if you, Mr. Shoemaker and Senator Langer, would be good enough to give me a few minutes of your time at your next visit, so that I may submit something which I would like to say *viva voce* rather than put it in writing.

For the record, I wish to mention that when you were visiting our stables ORR at Ellis Island on July 31 and sitting next to Senator Langer on one of the "dangerous"

beds with us crowding around you, I heard the indeed Honorable Senator of North Dakota, after looking us over, say to you in an undertone: "... isn't it pitiful!" And you, a little embarrassed: "... yes, an awful mess ..."

Yes, Sir, it is an awful, sorry mess, in fact, it's a disgrace, —unworthy of this great and generous land. Therefore, it was comfort, moral help, to see a Senator from Washington moving so informal among us, the dangerous animals, without a gun in his hand nor bodyguards at his sides, putting us at ease and treating us as human beings in a kind, a humorous and tactful way. That will never be forgotten!! Thank God!—there was at least one man in these United States, a man with insight, understanding, who had the charity, the moral courage and the will, to stand up and speak for us. Anyway, it meant a lot to me and reaffirmed my faith in the Great and the Good of this wide land.

In conclusion, may I take the liberty to remind you of the parts you read of a report in the Detroit Times of December 19, 1939, that is, almost *eight years* ago, in connection with the denial of my citizenship which the reporter, Milton M. Murray, in open Court rebuked as "a flagrant miscarriage of justice." Here are the pertinent quotations:

Wife a Witness

In court during the hearing and, briefly a witness in his behalf, was Ludecke's American wife.

"I know that his change of heart is complete," Mrs. Mildred Ludecke said, "or I would not be here to testify for him. I know the agony he has gone through. He is not a man who changes his convictions easily."

Judge Tuttle questioned Ludecke on recent speeches, asking:

"You are preaching in America that the Treaty of Versailles is unjust?"

"Many Americans say so," Ludecke replied.

Praising the economic philosophy of the American writer, Edward Bellamy, Ludecke referred to economic ills, saying:

"No one can tell me God ordained so much misery."
Judge Tuttle interrupted:

"Do you have the idea there are people hungry in this country? Or that people are shivering in the streets? We have been freest of any nation of such evils for a hundred years."

Quoting the President

"I quote the President," Ludecke said, "who referred to the ill-fed, the ill-housed and the ill-clothed:

"If you call me a revolutionary because I believe Edward Bellamy was right, you condemn not me but Edward Bellamy, a native American and a noted philosopher."

"If you call me a revolutionary, you must remember Carl Schurz, a German revolutionary who escaped prison and came to America. Here he became an editor, a minister to Spain, a general during the Civil War, a senator and finally secretary of the interior under President Hayes. He was a revolutionary who found a new freedom and a new way of life."

Will Work His Best

"If the question of what I am going to do, if granted citizenship—or not—arises, I can only say: I shall continue to earn an honest livelihood as best I can."

"However, if freedom of thought and speech is permitted to one and denied to another—if for instance a man of German blood must become a coward and a liar to be eligible for citizenship, then I prefer to remain a man without a country, but a welcome burgher of the eternal realm of truth, rather than live the life of a hypocrite and a living corpse."

"To understand all is to forgive all. In this spirit of goodwill I shall be only too glad to shake hands with any honest gentile or Jew, black or yellow man, and help to get us a little closer to the goal of universal brotherhood."

"Please, your honor, do not see in the man now standing before you Hitler or Nazi Germany or the German-American Bund.

"Here stands Kurt Ludecke—nothing and no one else. Do not deny him the physical foundation for his spiritual aspiration."

It may interest you to know that a Jewish leader, an Associate Justice of the U. S. Supreme Court, the late Louis D. Brandeis, was one of the prominent Americans who endorsed Bellamy's philosophy and concept of a true democracy, that is, *the American* philosophy in *practical* terms, proclaimed in the immortal Declaration of Independence, which LINCOLN said "is an abstract truth, applicable to all and all times."

And it is significant of Bellamy's *OWN WORLD*, that he rejected violence of any sort and never once in *Looking Backward* and *Equality*, his masterpiece, used the word Jew. Yet his nature and practicable *PLAN*—so simple and so true—does solve the Jewish problem which to use the thoughtful words of a Jewish writer "is the Gentile problem grown acute." (The case against the Jew—by Milton Mayer, Saturday Evening Post, March 28, 1942.)

But—it must not be forgotten that "the great American prophet," the gentle Bellamy, most honest and wisest revolutionary of all times, also voiced this warning now fifty years ago: "... would you have blood, you have only to stand still and it will come up to your lips one of these days. We stand at the parting of the ways."

Please, dear Sir, receive this letter in the spirit it is written, the spirit of goodwill, and believe me that with my very best wishes I am

Sincerely yours,

KURT G. W. LUDECKE.

To: Senator William Langer, Mr. Thomas B. Shoemaker, Deputy Commissioner of the Immigration Service.

Registered. Return Receipt Requested.

Senator Langer, Mr. Shoemaker, and Mr. Rothstein did come to Ellis Island on September 23, but stayed only a few

hours to interview some alien enemy internees now out on parole. Petitioner did not see them and to date has not been honored with a reply by Mr. Rothstein.

It may well be that some people do not like the language Petitioner speaks in dealing with and speaking of his case. Therefore, he wishes to quote from a paragraph of his Statement for the Attorney General of December 17, 1945, which reads as follows:

I have borne with patience the raw deal I have had ever since the unjust denial of my petition for naturalization in 1939; I have kept quiet during my internment, because I understand that in time of war every precaution must be taken to secure the safety of the land, and because I realize when suspicion and intolerance, violence and hate, are rampant that injustices and encroachments will occur; but now that the war is over I say aloud that an honest and intelligent effort should be made by all concerned to establish orderly processes without even a vestige of malice and vindictiveness.

Only after Petitioner realized that he was talking to stones and not to hearts, his indignation began to color his language. To ruin a man's married life, to ruin his livelihood, to hold him in prison day after day, week after week, month after month, year after year, all this for no good reason whatever, and then on top of this outrage to order his deportation—unjustly and cynically branding him a "dangerous" animal—to perpetuate his misery in Germany, again without due process of law but by means of falsehood and deceit, that is enough for any man.

Having lost everything but his self-respect and knowing in his mind and in his heart, that he is wronged and that his sufferings have earned him the right to speak as he does, Petitioner—with truth and reason on his side—thinks it is his duty to defend the integrity and the dignity of the individual, and being of German blood of which he is not

ashamed to defend the integrity and the dignity of the German people now lying prostrate at the mercy of the victors without hope for the future. Moreover, it is said that liberty is an indivisible boon which when threatened anywhere in the world is threatened everywhere else, and that he who fights for the blessing of liberty, at any time and everywhere, is fighting for the liberty of all.

10. Now, Petitioner is coming to the Brief for Respondent in Opposition to the Granting of the Petition for Writ of Certiorari in which the Solicitor General, the Hon. Philip B. Perlman, utterly failed to prove that Petitioner's argument is without merit. Quite to the contrary, Respondent's Brief serves but to emphasize the inescapable necessity, that the highest tribunal of this great land, the Supreme Court of the United States, should pass upon the all important and decisive question here involved.

Even the Solicitor General ignores the basic questions and contents himself to repeat former assertions and to continue to point to "precedents" such as the *United States ex rel. Schlueter v. Watkins* and *Citizens Protective League v. Clark*, although Petitioner has shown in his Petition and supporting Brief the invalidity of these assertions and alleged precedents apart from the fact that neither side of the above mentioned cases deals with the fundamental issue and the cardinal principle involved as Petitioner did in the instant case.

After all, simply to repeat over and over again that two and two make five because other people are saying so does not alter the fact, that two and two still make only four.

But there is one point in Respondent's Brief which calls for an unequivocal reply. It is the memorandum opinion of District Judge Tuttle (E. D. Mich.) mentioned in a footnote (RB. 2)* and produced in Appendix B of Respondent's

* Bracketed RB. with figures in this text refers to pages of Respondent's Brief.

Brief (RB. 12-15). A proper evaluation of the said Opinion requires a brief outline of the background leading to the making of this Opinion.

Relator had his first hearing in his naturalization petition on June 16, 1939, before the said Judge, the late Arthur J. Tuttle, in which Mr. Robert C. Wilson, then chief-examiner of the Naturalization Service at Detroit, presented the case and unsuccessfully tried to connect Petitioner with Fritz Kuhn (whom Petitioner had never met nor had had any connection with whatever at any time), the deported ex-leader of the no longer existing German-American Bund. Petitioner's immediate and energetic objection caused Wilson to back down and pass the case on to the Judge "without recommendation and prejudice pro or con." It was then, at this first hearing on June 16, 1939, that Petitioner introduced his book "I KNEW HITLER" as evidence and left a copy with the Judge. And the hearing was continued for further investigation.

After waiting months without hearing from the Court Petitioner wrote a letter to Judge Tuttle, dated September 11, 1939, some pertinent parts of which are quoted below.

Your Honor:

"Enclosed article in the Detroit News of September 10 asserts that 'Ludecke Citizenship Rests on Reading of Book' and that 'the wait is indefinite, since Judge Tuttle admits he has read only a few pages of the 814-page volume.' "

"This may be idle newspaper talk. . . . I take the liberty of writing this letter which I hope will simplify matters. . . . "

"I want to make it perfectly clear that I am not the promoter of any individual or political group here or abroad. I do my own thinking and am absolutely independent of spirit. . . . it is true that my political life is ended. . . . I am definitely not concerned with politics. . . . I have no office, no connection with the

past; I am not a propagandist in any form as stated in my interviews with the Detroit News of October 23, 1938, and the Toronto Star Weekly of October 29, 1938, which also should be in the file of my case. In this connection I should like to recommend reading of the enclosed copies of my letter and Statement of January 25, 1939, I sent to the Naturalization Service.

" my book bears evidence that I have always opposed, as early as 1927 when I still was an active Nazi, any Nazi organization in America subject to any influence from Nazi Germany (see pp. 292-93; 318-26; 410-12; 541-2;) and that in March 1933 I finally succeeded in bringing about the dissolution of the Nazi units in the United States by official decree from Nazi headquarters after Hitler's rise to power. (See pp. 326, 585, 587, 588, 797-99.)

" Actual developments which I predicted many years ago are conclusive proof that the analysis presented in my book is correct.

" the whole tenor and structure of my book clearly indicates that I have outgrown my Nazi life and am striving to remake and readjust myself for a new existence. I do not hesitate to admit that my Nazi experience has cut very deep. But it is equally true that I am ready today for a new life, physically, emotionally, mentally and spiritually.

"The chapter 'In a Mental Strait-Jacket' ends my personal story after my escape and final arrival in New York the night of June 30, 1934, when headlines screamed the news of the Blood Purge. Well, that chapter should close with the invocation as originally conceived: God, you saved my body, now save my soul!

"My prayer has indeed been answered. The above mentioned interviews, given already a year ago, clearly show the direction and development of my inner self, after a long and bitter struggle to reassert myself. Now, at last, the battle is won.

" Therefore, if it pleases Your Honor may I request an early date for another hearing of my case."

And here are some paragraphs of the Statement mentioned above copy of which was enclosed in the just quoted letter to Judge Tuttle:

"... My present attitude is nowhere revealed in the book. [I KNEW HITLER] It would have been impossible to do so because, as I have stated in the preface, the end of the book was the beginning of a new life.

"Only superficial reading or misinterpretation of my work could lead an ignorant or prejudiced reader to the false conclusion that I am still a Nazi.

"The whole tenor and composition of the story as well as the definiteness of my attitude expressed in the preface and elsewhere should convince any honest reader of my objectivity and independence of spirit, or at least of my having made an earnest attempt to be objective and spiritually independent.

"My book is the soundest presentation as well as the strongest and most convincing indictment of Hitler ever printed, because of its veracity and frankness based on my intimate knowledge of Hitler himself, of the structure of the Nazi party, and finally of Nazi mentality, or better of human nature itself.

"Moreover, my criticism of Hitler, and the unflattering portraits I have drawn of Goering, Goebbels and Himmler alone would suffice to put my head under the executioner's axe should I ever show my face in Nazi-land as long as those men are in power.

"On the whole, there can be no doubt that the publication of my book in itself signifies a complete break with Hitler and has irreparably burned my bridges with Nazi Germany. (In this connection I point also to the enclosed copies of the Chicago Sunday Tribune which published recently abridged parts adapted from "I KNEW HITLER" in a manner which sensationalized the sensational.)

"... The pages 292-3; 304-5; 317-26; 410-12; 541-2; 585, 588; 797-9 show clearly my understanding attitude towards America even at a time when I still

was an active Nazi. I realized ever then that America had a destiny of its own which should be determined by Americans without any interference from abroad or influence which could disturb the solution of the American problem of unity.

"... Aside from the inner necessity to write the story off my chest I was governed by the urge to write an honest book that might serve as a lesson to America. From the beginning I was well aware of my vulnerable position; for telling the truth put me between Scylla and Charybdis, or, as you say, between the devil and the deep sea. Neither the outspoken Nazi nor the outspoken anti-Nazi like my book. But in writing the truth I hoped that it would help to teach America not to repeat in this country, blessed by nature and geography with two oceans separating her from Asia and Europe, the mistakes which have brought the peoples across the Atlantic to the brink of disaster.

"The claim that my book is 'anti-Semitic' and therefore tends to stir racial hatred is dishonest and unfounded; it can come only from Jews who suffer from 'persecution hysteria.'

"Needless to say it is impossible to explain Hitler and Nazi-land without mentioning the Jew, because he is a part of the problem. But I have dealt with the Jew only as far as he is pertinent to the story as an explanatory factor, and then only on the basis of historical fact. After all, one cannot change history merely to please some unrational people.

"Hatred blinds and destroys. My new faith forbids me to hate. And I do my best to serve my fellow man. Since I set foot again on American soil, in 1934, I have struggled and groped for the truth. Now, at last, having reached inner security I am in earnest to do the right thing in the right way regardless — the consequences to my physical self.

"My attempts to be constructive in my statements and in my criticism may be seen in the enclosed clippings. While they do not always quote me exactly, they are accurate on the whole.

"To be specific, I believe in the necessity of striving for a truly functioning democracy, politically and economically, socially and spiritually; that in this slow process of evolution, i. e. the gradual amalgamation of the different human ingredients on the American continent into an organic whole, America is still in the first stage, namely the crystallization of its people around a central idea which is Americanism; and that therefore all nationalities, for instance, the English and German, the Italians and Poles, including the Jews, must become Americans, in spirit and action.

"Behind the oft quoted words of the Great Emancipator "Government of the people, by the people, for the people" lies a world of thought.

"In substance, they mean: A government consisting of true Americans elected by the American people as their wisest representatives to govern ably and justly for all of the people.

"This is, basically, my concept of Americanism."

January 25, 1939.

The second hearing took place on December 5, 1939, three months after the beginning of the Second World War, when the psychological mobilization against the Nazis as well as the Germans was already in full swing also in the United States—a significant fact which the late Judge Tuttle exploited to the full.

His Honor did not deport himself as a judge giving Petitioner at least the benefit of the doubt, no—he acted like a ruthless prosecutor treating the bona fide applicant like a criminal defendant, abusing him, ridiculing him, insulting him, provoking him. But Petitioner managed to control himself and avoid "contempt of Court" because a certain stubbornness and psychological curiosity as well as other reasons mentioned later prompted him to suffer the ordeal, though several times he nearly bursted out and withdrew his application. After some 8 hours (a short recess for lunch included) of this amazing performance in a large

court room packed with people, the hearing was adjourned to December 18, 1939.

It is a matter of record that Petitioner prepared a Brief for the third hearing which he read in Court and left with the Judge.

The exact copy of this Brief as delivered in Court and left with the court is as follows:

KURT G. W. LUDECKE

Re: Petition for Citizenship

BRIEF

for Judge Arthur J. Tuttle read in Court and left with the Judge at the hearing on December 18, 1939, in Detroit.

Your Honor: At the end of the previous hearing, December 5, you said that you would give me a chance to prove that I have changed, that I could bring a lawyer,—or two if necessary, to prove my case.

I decided to be my own counsel. I have no money to waste and, after all, I know this case and the issues involved far better than an attorney could possibly have learned them in the time limit of only twelve days. Besides, and this is important, it seems to be less a case of the letter of the law than a case of understanding, of psychology, of justice.

May I begin with respectfully making a request, first, that Your Honor please show indulgence should I violate customary procedure, because I am not familiar with court formalities; and second, I beg your Honor to listen to my Brief with an open mind, because all my efforts are in vain should Your Honor, if I may say so, persist in the hostile attitude shown at the last hearing.

After my experience on December 5 here in Court I seriously considered to withdraw my application for citizen-

ship. But after earnest contemplation I determined not to dodge the issue, for three reasons:

First, I owe it to my wife to do all I can to make it possible that I provide for her better than I have been able to do in the last few years. It is evident that a legal status is imperative, if for nothing else than to earn an honest livelihood. In these times, a man without a legal status, without a country, without a passport which makes it impossible for him to move about, and, on top of that, branded as an undesirable, is practically condemned to death. Without doubt for me citizenship, as seen from almost any angle, is a question of "to be or not to be."

Second, it seems to me that here a principle is involved that is of greater importance than my personal little self, a principle *per se* which, ignored or observed, might serve as a precedent.

And third, I must do all I can to correct the false impressions Your Honor has of me and thus prevent a *negative* decision of this Court, which in my opinion would be a great wrong done to a bona fide applicant.

Apparently, the Court's intention is to base its reasons for denying me citizenship on the following two points:

First, the Ludecke as presented in his book is a bad man, an egotist, a gambler, a revolutionist; in short, an unlawful personage who had never done a good thing in his entire life; and second, in parallel to the leopard who does not change his spots, the present Ludecke is still a Nazi and revolutionist at heart, altogether an ambiguous, questionable quantity, therefore a potential trouble maker and undesirable nuisance, unworthy of becoming an American citizen.

My job is to make the issue and my position so crystal clear that an *honest* interpretation admits of only a *positive* decision.

Claiming that here two Ludeckes are under consideration, namely, the *Nazi* Ludecke up to his imprisonment in 1933, and the *new* Ludecke, the ex-Nazi, after 1933, it is necessary, right at the outset, to establish the important fact, I say important legally and psychologically, that I have twice taken out my first citizenship papers. The first time was in August, 1927. However, my first application for citizenship lapsed in 1934. In other words, the *first* Ludecke, the Nazi crusader, forfeited his rights to apply for his second papers. And then, as if following the inner logic of this development, the *new* Ludecke, the ex-Nazi, took out his *first* papers in 1934, filed his petition for naturalization and now is standing before Your Honor pleading his case.

Therefore, technically at least, my present petition has nothing to do with the first application running from 1927 to 1934 of a Ludecke who is dead. Ergo, the question could be raised whether the present petition should not be decided wholly on the merits of the case dating from the second filing of my first papers in October 1934.

However, I do not wish to insist on technicalities.

In view of the highly controversial nature of my case I did not wish to embarrass anyone by asking him to testify in my behalf. But here is an important letter which I received only Saturday night after I had finished writing my Brief. It is the more valuable because it was *not* solicited by me. I produce the letter addressed to Your Honor as evidence because it has weight and backs up what I am going to say.

The writer is Dr. Pieter Roest. Excluding my wife he is better qualified than any one I can think of to pass judgment on me, a man of highest quality and integrity, the author of this precious little book: *A Life View for Moderns*.

I quote . . . (The said letter is Exhibit II and appears in the Appendix to Relator's Certiorari Petition, pp. 83 and 84.)

I proceed with my Brief.

In order to avoid confusion, I shall refer to Ludecke, the Nazi crusader who died in 1933, as the *late* Ludecke, and to the living Ludecke as the *new* Ludecke.

It seems to me that I must show, first, that the late Ludecke, as revived in my book, all told was not such a bad egg, that on the contrary, in spite of his many faults, errors and weaknesses, he was a genuine revolutionary idealist who, on the one hand, subjecting everything including himself to his cause, has done his share as best he could to prepare the conditions for the resurrection of prostrate Germany; and who, on the other hand, has had to pay heavily for the rich experiences he was allowed to have.

And second, I must show *that*—and *why*—the Ludecke of today has of necessity become a *new* Ludecke, a transformed personality who should be given the privilege of American citizenship.

I begin with part one, the *late* Ludecke.

First, Your Honor declared that the late Ludecke was merely a gambler, a job hunter, a money seeker, a cheap selfish opportunist.

My answer: Gambler! First, I was never a gambler at heart, as I state explicitly on p. 20 and 21 of my book; second, that episode happened twenty-seven years ago and was of so short duration that it was merely one of the many worldly experiences which certainly brought me no nearer to heaven but may have helped me over many a hurdle here below.

Before I proceed, I should like to emphasize that one may read into a book what one wants to, and give an interpretation exactly opposite to the meaning the writer wanted

to convey, just as wishful thinking may lead to false estimates and interpretations of people and situations. Passages taken out of the context, if the whole is lost sight of, must give false impressions and wrong conclusions. My book must be taken as a whole because it is a unit organically conceived.

Was I a job hunter, a selfish opportunist?

"I Meet Hitler"—the first chapter of my book, clearly shows that the late Ludecke in joining Hitler in 1922 was moved mainly by emotion and instinct, and partly by reason, but not at all by self-seeking.

"I had given him my soul" is the thought which ends this first chapter and with it the late Ludecke surrendered to the cause his money, his time, in short his whole personality whatever it was worth.

At that time I was not poor, as were most of Hitler's followers then and later. On the contrary, I had plenty of money, as clearly stated in my book. I certainly did not join the Nazis to make a career for myself. At that time, in the early days, to join Hitler was a risk, especially for an intellectual with means. It meant a clear break with the so-called social life, with your friends and often with your family. (See p. 100.) Americans, 4,000 miles away, have not the faintest notion of the embittering hell of those years. To understand, one must have been part of it.

If Your Honor should not remember those parts of my book which substantiate this statement and did not find time to read the manuscript of my speech I have sent to your office a week ago, I can quote from both if necessary. (See page 15 and 22 of speech.)

May I ask Your Honor if you have read my speech? (He replied, "yes.")

Anyway, all the travelling I did for Hitler [before he came to power in 1933], inside and outside of Germany—in Hungary, Italy, France, England and America, I have paid out of my own pocket. And more than that, I have given money to the movement, as well as to Nazi individuals, all this running up to thousands of dollars, a lot of money in Germany in those days.

The only recompense I have ever had was a meager one thousand mark note which Hitler gave me for my expenses, in Munich, 1932, when I was commissioned to return to Washington as the representative of the Party and the party press. And the only money I ever received from the Party was the relatively small sum of about \$500.00 a month, with which I had to maintain my office and myself, for a few months, from October 1932 to February 1933. All this is told in my book, pp. 553-54, in the chapter, "Distant Thunder."

It is equally false to call the late Ludecke a job hunter. The exact opposite is true. In the same breath, Your Honor called him a constant revolutionary. It is evident that the one excludes the other. A revolutionary is not, cannot be a job hunter, a cheap politician.

It is a matter of record that it was Hitler, not I who asked me to go to Rome in August 1923 to act as his representative with Mussolini, and to go to America in the interest of the movement, as can be clearly seen from the credentials bearing Hitler's signature, which are reproduced in my book between pp. 140-41, and pp. 190-91.

If there is still any doubt whether the late Ludecke has been a cheap job hunting opportunist, may I point to the touching letter which my wife sent to Hitler after my imprisonment. She wrote this letter while entirely in the dark about what was going on, having been for months without news from me. This is reproduced in the appendix [of I Knew Hitler], pp. 797-99. (Quote . . .)

I think that settles this point.

Your Honor accused the late Ludecke of duplicity, dishonesty, and of following the doctrine that "the end justifies the means."

My answer: Anyone familiar with the backstage of politics in Germany or elsewhere knows that politics is a hard game, and will remain a sorry business as long as certain conditions prevail. But that does not mean that no honest man should go into politics. On the contrary, if more honest fearless men entered the arena, the dirty game would soon become clean.

And the *early* [Nazi] movement in Germany was in fact a violent reaction against irresponsible politicians, and against the entire system which was responsible for breeding such politicians. The late Ludecke certainly approved of this aspect of the battle fought by the activists of the Nazi party. Unfortunately, even these were by force of circumstances drawn into the vortex of "dirty politics."

However, one must bear in mind that the late Ludecke specialized in foreign politics, and after 1923—I say as early as 1923—had nothing to do with the internal development and domestic policies of the Hitler party. Nor did he have any influence whatever on the moulding of Nazi thought and the shaping of the Nazi system, for the simple reason that except for two short visits he was continuously outside of Germany from August 1925 until March 10, 1933, 39 days after Hitler's appointment as chancellor. And of the twelve months he spent in Germany in 1933-34, he spent eight and one-fourth months in prison and concentration camps, *because* he opposed certain developments which had taken place during his absence from Germany. [That at a time when the American Government officially recognized and did business with the Hitler Government.]

This is a matter of record, which is clearly explained to Your Honor in my letter of September 11, 1939.

Moreover, the late Ludecke, who returned to Germany in July, 1932, when the entire nation was in suspense over the final struggle for power suffered great disillusion over certain developments within the party. The inner conflict which then took hold of the late Ludecke is progressively revealed in his story. I may refer here to pages 422, 466-7 and 539-40 and quote from them, with your permission.

Point two. Now, is it true that the late Ludecke was dishonest and cheated his employer?

No, it is not true. When he was a travelling salesman, the late Ludecke did more than his duty; he sold above his quota. He worked hard from 9 o'clock in the morning to 11 at night during 4 or 5 days of the week. Of the salesmen hired at the same time as he was, he was the only one who was kept. He was not fired, but left of his own accord. What he did with his remaining well-earned time was his own affair.

The late Ludecke's work for the German publishing house he was connected with when coming to Canada in 1925 was on a part time basis only. Besides, the head and owner of the firm was a Nazi sympathizer also [at that time.] The incident was only mentioned in the book in passing to illustrate his difficulties and complications at the time. To hold minor occurrences like that against his character is searching for things which are not there and trying to pick flaws in everything he did. This becomes clear if one reads the whole passage. (p. 293.)

Your Honor showed indignation over the Nazi's use of the maxim: *the end justifies the means*. As far as the late Ludecke is concerned, Your Honor can include him only until the beginning of 1933, because he had nothing whatever to do with what happened under the Hitler regime.

But, as already explained, due to his absence from the country he had nothing to do with the development of domestic policies since 1923.

In fairness to the late Ludecke, it should be remembered that, with him, the "end justifies the means" policy held only so long as the means employed did not jeopardize the good end, namely the liberation of the German people. As soon as ignoble means were employed which made the Hitler movement so vulnerable as to jeopardize its very idea and the future of the German revolution, that same Ludecke went into opposition, knowingly at the risk of his career and of his life.

This has been fully recognized by Josef E. Gellerman, critic of the *Washington Post*, whose intelligent review of December 3, 1937 [of *I Knew Hitler*], I quote: "... a literary achievement. They are written by a man who is German to the Americans, and an American to the Germans, who is at home anywhere and everywhere and who has now confined his superior talents to an inside story of Hitler's rise to power Kurt G. W. Ludecke is undoubtedly a gifted writer, a student of human nature with a mature knowledge of social and political currents stretching from the Baltic to the Pacific Coast, from Mexico to Berlin. His story is magnetic, filled with human interest, enlivened by histories, philosophical excursions and tingling with a clever, sophisticated sense of humor A strong National Socialist, he is not a Hitlerite. This conflict of placing the idea of national socialism above the idolatry of the person of Adolf Hitler caused his ultimate downfall and banishment from the circle of the mighty within the leader's group.

Undoubtedly Ludecke knows Hitler. Did Hitler know Ludecke?"

Moreover, my personal attitude concerning "the end

justifies the means" is clearly expressed in unmistakable language in a passage of my speech (p. 23) which is verbally taken from my book. (p. 788). Quote . . .

"The corruption of our times and the mendacity of his opponents helped, of course, to make Hitler what he is. But while he still strove for the highest aims, he himself became corrupted by his willingness to employ ignoble means. Though dishonesty may be an asset to a professional politician and ambitious demagogue, it is incompatible in a man who pretends to embody all the requisite virtues of a leader predestined to remake the German people on a new spiritual foundation. If Christianity must be reformed, if religion must be brought to the level of the scientific findings of today, if there is no room for the Christian Cross and the Swastika Cross in the same realm, then the struggle must be waged with honesty and truth. Christianity may be conquered only by elevating the moral plane of the people and not by lowering it.

"The fraud, the inner contradiction in Hitler, in the last analysis is the underlying conflict with which the whole Hitler system is diseased. It is this great deception, more than anything else, which has made Hitler vulnerable and has discredited his cause in the eyes of the world. History cannot and will not acquit him of guilt."

[Nota bene, this was written and published in 1937, at a time when Hitler's accomplishments regarding the physical rehabilitation of Germany were undeniable and remarkable, years before Hitler turned into a monster of self-deceit and crime.—Comment by Petitioner while copying this brief on October 22, 1947.]

I emphasize, first, that a copy of my speech in question has been in the hands of Mr. Robert C. Wilson of the Naturalization Service since March, 1939, second, that another copy of this speech was sent to Your Honor with my letter

of December 9, 1939, and third, that a copy of my book "I Knew Hitler" has been in the hands of Your Honor since the first hearing on June 16, 1939.

I proceed to point three. Your Honor made the assertion that the late Ludecke has never done a good or useful thing in his entire life.

My answer: It is very possible that you and I have different ideas about values and life as such and therefore differ in our interpretations of realities, of good and useful things, yet both of us basically believe in the same decisive truth, that there is a God, a SUPREME BEING.

In my book I relate only what is pertinent to the story of the Nazi in connection with the large canvas I tried to paint. Also, the purpose of my book was not to tell the world how bad or good was Ludecke, the Nazi crusader. The purpose was this, as stated in the preface to the English edition of my book:

"Here is a story from which a lesson can be drawn. Written from life, my ambition was to create a picture of the development and growth of Hitler and the Hitler system, giving a background which would help to explain the Hitler of yesterday, today and tomorrow, and at the same time reconstruct the thoughts and emotions of my former self, in order to reveal for all to see the process of progressive disillusionment of a Nazi revolutionary activist."

In fact, many competent people have realized that my book is, among other things, a *vital lesson for America*.

Returning to the questioned "goodness" and "usefulness" of the late Ludecke, may I say that the surrender of a person's whole life to work for a cause is, in its intent and purpose, a good deed, a fine impulse.

I should like to quote here from a passage of which Your Honor quoted only that part, in the last hearing, which might speak against me. (Quote pp. 292-293 etc.)

That showed faith and purpose.

But at the last hearing Your Honor insisted on a specific answer. I was a little puzzled for a moment. Everything else seems so small in comparison to one's willingness to give his life for an idea.

When I came to, I remembered that I had anticipated the possibility of such a question, and produced a reference work (ASHWELL'S WORLD ROUTES) of some 900 pages which I placed on Your Honor's desk. But it was dismissed with a gesture of contempt and the remark that the book was just another travel guide—one of those advertising stunts anybody could compile. And that was that.

Now the truth is that I and two assistants labored for a full year over the work, often twelve hours a day, week-ends included. It is a travel guide by water, land, and air, a reference work meant more for the trade than the public, containing a wealth of information. Moreover, the book was not published by the trade, but by a regular publishing house, which spent \$25,000 getting it out.

It is very difficult to get advertising for a new untried vehicle, and the advertising manager of the publishing house was able to secure but very few contracts. So on top of the editorial work I had to go after the advertising, and about 83% of it I obtained myself. And here are some letters written to me by leaders in the travel trade praising the work. (Show letters.)

I explain this in itself unimportant matter because of the way in which it was treated in my last hearing.

In the last hearing, Your Honor touched even the field of Hitler's foreign policy as a point against me because the late Ludecke suggested to Hitler that he consider an understanding with Soviet Russia.

My answer: I cannot see what this point has to do with my eligibility for citizenship. However, a German policy of understanding with Russia did not originate either with

Ludecke or Hitler. Frederick the Great and Bismarck, already realized its importance on account of geographic, economic, and geopolitical reasons.

And, why blame Hitler alone? He would be a fool to put Germany between a pincer and risk another war on two fronts. England tried for months to close a military alliance with Russia in order to crush Germany once and for all. Is it right of the English, on the one hand, to condemn the Bolsheviks for attacking Finland, but, on the other hand, go to Moscow for a pact which would help to crush the Germans?

Now, to point four. Your Honor made the statement that I had criticised in my book everything and everybody, only to say an hour later with equal positiveness that nowhere had I criticised Hitler and the Nazi Party, observations which seem to cancel each other.

My answer: I have taken the trouble to go through the book with a special eye to this question. I found that the sketches or pictures I had drawn of about 40 people are positive, some definitely sympathetic. If Your Honor wishes the list of names, here it is.

In particular I beg to correct the impression Your Honor had that I repeatedly referred to the Franciscan monks in a disparaging fashion. The exact opposite is true (Quote pp. 294-6). The picture I have given of the monks and the atmosphere of the cloister has poetical and spiritual qualities because the experience touched the emotional depths of my being and never fails to move me whenever I happen to think of it.

So much for criticising everything.

Did I criticise Hitler? The very dedication of my book, printed in capital letters on the frontispiece "To the Memory of Captain Ernst Roehm and Gregor Strasser and Many Other Nazis Who Were Betrayed, Murdered and Traded in Their Graves" would have been sufficient to

put my head under the executioner's axe. In the text, praise alternating with blame runs through the entire length of the volume, the criticism of Hitler, the Nazi bigwigs, and of the Party being often very sharp and biting. In fact there are entire chapters full of condemnation.

Like groups in any land, the Nazi organization had its incongruities, contradictions and contrasts. There were horrid Nazis and decent ones, intelligent and stupid ones, brutal and even gentle ones, there was tragedy and drama, boredom and fun; in short, written from life, my story rises and falls, often the sublime one step from the grotesque.

The merit of my book is that it is an *honest book*. And naturally, Hitler, for instance, imperfect like any human being, emerges here alive, the man, not the demi-god and not the monster. [Nota bene, this was said in 1939.]

Certainly, there must be criticism of Hitler in my book, or the Chicago Tribune, decidedly not a pro-Nazi paper, would not have serialized it in nine installments. (Produce title page.).

Still more convincing is this: Of all people the English and the French would not, at the present time think of propagating flattering pictures of Hitler and his party.

Well, here are two letters, written *after* the declaration of war, one from my publisher in London, and the other from my literary agent in Paris, which prove conclusively the point in question.

The letter from London proposes the publication of a cheap abridged edition, and the projected sale of 3,500 copies of my book to an English book club, a transaction which has recently taken place, to be exact, October 23, 1939.

And only last week, I received word that a French publisher is seeking the rights for the French edition, this in spite of the almost total stoppage of book-publishing in France, due to wartime economies.

You will agree, Your Honor, that there must be substantial criticisms of Hitler in my book, otherwise neither a French nor an English publisher would consider to publish and distribute it, with their nations engaged in a war to "crush Hitler." (Show letters.)

As for the late Ludecke, I think enough has been said and we should leave him in peace. Summing up, may I say that altogether he was not quite the contemptible character Your Honor has chosen to make him appear. Although a revolutionary and a crusader, he only followed the natural impulse of every red-blooded man wishing for the independence of his country as once the Americans did in 1776.

PART II

Now, I come to Part II—the *new* Ludecke whose eligibility depends on the answer to the question: is it true that the man who stands before you is a new Ludecke who has broken with the past?

The book "I Knew Hitler" reveals nothing of the new Ludecke who tells the story of his Nazi ego, his struggle and his end. The autobiography finishes with the arrival of a problematic Ludecke in New York on the very night that headlines screamed news of the Blood Purge, June 30, 1934.

The Nazi Ludecke did not die a sudden death. He was dying over a long period of time, while the new Ludecke was slowly emerging. Time limits forbid me to go into details of this process. Suffice it to say that a man of the type of the late Ludecke either perishes or struggles through to a new life after disillusion and experiences, humiliations and despair such as he suffered.

Before I proceed, I want to recount an experience which made me realize that I *was* to live a new life, a decisive experience I have not mentioned in my book.

I must guard myself against the accusation of exhibitionism if I cut deep to explain myself. After all, much is at stake and it was *not* I who has sought public discussion of most intimate questions regarding my person.

After over three months' imprisonment, in October 1933, bad news reached the late Ludecke in the Brandenburg concentration camp, as related in my book on page 708. He was called before the camp commander who told him that an order had been received from the Gestapo, the State Secret Police, that Ludecke was not to be allowed to receive visitors, and that all his mail must go through the Gestapo.

It was an ominous answer to the pleas sent through the Commandant directly to Hitler and the two Nazi authorities most qualified to intervene in the case. He, the late Ludecke believed then, and I believe still, that Hitler himself was behind that order.

Now the late Ludecke felt the seriousness of his position to his fingertips. If he wanted to leave this or any prison alive, he would have to get busy. But before he could concentrate all his being on the one thought of escape, something happened.

Escape was a problem. He had not only to get himself outside the prison, but safely over the border, hundreds of kilometers away, and then to the United States. He had little money, and that was out of reach in the bank; he had no passport, and his re-entry permit for the United States was to expire on February 21, 1934.

Escape would be worthwhile only if he could start a *new life in America*. Without the possibility of a *new life*—this I state explicitly on page 713 of my book (quote)—he would have preferred suicide, for he had *no* wish to moulder in the horrible life of an unwanted refugee in Prague or Paris. He anticipated clearly that a man beset by the innumerable difficulties encompassing an exile can hardly remain independent, however high his personal integrity.

Thus, cool-y analysing his physical, emotional and mental problem, he always arrived at the same seemingly inescapable conclusion: his was a hopeless case. Even should he reach America, here also he would find himself between the devil and the deep sea, defeated and dying under self-torturing frustrations, unable to save his wife from the wreckage of his own life. No, seen from every angle, it looked hopeless. So he decided to kill himself.

Gradually he overcame the resisting forces, the instinct of self-preservation, the mental and spiritual resistance, the emotional unwillingness, and the physical fear. And one night, after finishing some letters, he strangled himself.

But it was not to be. He had only stifled his consciousness, not life itself. After hours of insensibility, he came to.

I shall refrain from disclosing more of this unforgettable experience. It must suffice to say that I awoke with a new lease on life. A force stronger than I had intervened to save me.

And almost instantly with the awakening, an idea flashed through my mind: I had a story to tell, which, once written off my chest, would make me free for a new life. I felt as though God had spoken to me. And I pledged myself that should I be spared I would live a new life and try to be a servant of truth.

Gradually my thoughts crystallized. Already in prison, the foundation for my book was laid.

It was this experience, this—for me, miraculous resurrection which was the source of new hope, the will to live, the strength and the patience to work for my escape and to go through with it.

Of course, the final liquidation of the late Ludecke was a process of some duration. The revolutionist and Nazi crusader had nine lives like a cat. There still may be a vestige of him that is not wholly exterminated. That's why I called the chapter closing the personal story of the late Ludecke

"In A Mental Strait-Jacket," and mentioned in passing that "I was indeed two men, each trying to annihilate the other." (pp. 730-1 and 752) Quote . . . also from my letter to Hitler, p. 753-54.

It may well be that these most involved psychological developments should have been presented with more clarity than has been done in this and other chapters. But I think in the light of the explanatory and supplementary comment I have given today, it should be understood that I have the right to speak of the *late* Ludecke and the *new*.

After all, a book can give only so much, and not more. And when I was writing my story, I did not contemplate to what an extent I would have to dissect my personal and intimate self in order to convince the authorities that I am eligible for citizenship.

It also must be remembered that I had to write my book under terrific pressure. At times I did not know how to satisfy my hunger or pay the rent of my room. There were moments when my physical condition was so low and my mental state so confused that it seemed impossible to go on and try to untangle the mess of the past. From a literary viewpoint, my problem was not how to stretch the story, but what to choose from the overwhelming material at hand.

Ah, the reader only sees the finished product and does not realize what it means to write with the sweat of one's brow and the blood of one's heart; day in and day out to fight the same battle, to glue the seat of one's pants to the seat of one's chair and try to express the inexpressible. In those days I learned why there are writers who, relaxing, appear crazy to normal people. They have spent all they had in discipline and will on their work.

In short, as I have said in the preface of my book:

"The writing of my story, in a language not my own, has condemned me to re-live my Nazi life—the past—

for two long years, an agony which often filled me with despair.

"Though moods of maudlin self-pity, sharp self-criticism, or cynical contempt of all accepted values made it difficult sometimes to remain within the boundaries of common sense and maintain the right proportions, I have made an earnest effort throughout to be honest."

Besides, towards the end, when mentally exhausted, I was so pressed for time that instead of doing it in leisure from the manuscript, the final editing had to be made in a rush from the galley proofs, when every insert or change means resetting, time and money.

This explains why, for instance, the passage Your Honor denounced at the last hearing is not sufficiently clear, since it led to a misinterpretation on your part. I mean the last paragraph of pp. 506-7. (Quote)

If taken out of the context it may be misleading, but in connection with the whole it becomes clear that I mean Ludecke the Nazi "committed one of the greatest stupidities of his life."

Moreover, in order to give a true picture, I had at times to put myself in a half-trance. And certainly, at such moments for instance, living it all over again, I rebecame the Nazi. Sometimes I would discover myself talking aloud, or laughing, or with tears streaming down my cheeks.

Being my first book, I did not expect it to be a masterpiece. "Kein Meister ist vom Himmel gefallen" the Germans say—no master has fallen from the skies. But on the whole, I believe it is out of one mould, because it was written from the very stuff of life.

The three inserts which I have written into the copy Your Honor has been reading are inscribed in all copies which I have given to or autographed for friends. These inserts are to me important, because they, especially the latter two,

round out the book from the viewpoint of composition, and because they reveal the transformation of the late Ludecke into the new. I mean the insert, "God, you saved my body now save my soul" put at the end of the chapter "In Mental Strait-Jacket" which originally appeared in my manuscript at the end of the chapter "I Escape" and was later taken out to be transferred and forgotten; and the insert at the end of the book, intended to be the last thought, "The Great in the Little! Man—Learn to know thyself. Finding your inmost self is finding God."

This brings me to the abstract problem of the inner change *per se*, the inner growth and transformation.

Needless to say, all great religions, including Christianity, stripped of dogmatic formalism are alike in the essential concepts of God and Man's relation to Divinity. They all affirm the possibility and the necessity for each to find his way to God through inner change, through inner growth from earthly desires to spiritual desires. In fact, the quest for truth, the inner transformation from lower levels to higher planes is the very foundation, the premise of the religious concept of salvation.

Even the murderer, if humbly repenting, finds his way to God. "Wer immer strebend sich bemüht, den können wir erlösen"—whoever striving makes an effort, he can be redeemed, says Goethe.

If changes are possible in matters of religion which are concepts of the spirit applied to abstract realities, then changes also must be possible in matters of psychology, which are concepts of the mind applied to concrete realities.

Without exception, anyone who experiences a change, a transformation, a growth of the inner self, reaches a higher level of awareness. In my particular case a definite growth and change have actually occurred as a logical and cogent consequence of my experiences.

I have advanced to a point where I have ceased to think in terms of nationality alone, but in terms of humanity at large. Therefore today I identify myself too completely with mankind in all its forms to feel hatred towards any, however repulsive. And I am at least trying to follow the injunction of a Great One, "to oppose, and if needs be, to fight, lovingly."

This somewhat philosophical excursion may be supplemented by a short reference to the problem of the immigrant in general from the viewpoint of psychology. Every immigrant, male or female, old enough to have acquired a definite outlook on life, has to undergo a change, in many cases even a radical change, in order to become really one of you and to acclimate himself to the, for him, new American world.

It is well known that many of the older immigrants one day discover to their great sorrow that in spite of years of struggle they have been unable to readjust themselves, let alone re-root and reintegrate themselves. Feeling miserable to the end of their days, they are condemned to dangle between two worlds, though they may have been successful in establishing a tolerable or even pleasant material existence.

However, in my case, in contrast to most older immigrants applying for citizenship, I have had ample opportunity to come very close to the American people and to make up my mind whether I want to be one of you or not. In a sense, though still a Nazi in 1932, I had already been Americanized to such an extent that the Nazis nicknamed me the "Amerikaner." And in the end to no little degree my American ways brought me into trouble over there in Nazi land.

When I applied the second time for my first papers, in October 1934, I had visited this country seven times, had spent here in all seven years and ten months and knew

America from coast to coast, better than many Americans born in this country. Now, I have been in America thirteen years, and I have been married to an American woman for twelve years and six months, one whom I consider to be a fine example of American womanhood at its best, and to whom I owe to a great extent the respect and love I feel for the American people.

A native American grows into his citizenship almost unnoticed by himself, taking the consequences for granted as they come along. In my case, it has been a long painstaking process of study, analysis, suffering, and a variety of experiences which developed in me a high state of consciousness before I even decided which course I must take.

It is only natural under the circumstances that the authorities should handle my case with caution and have taken their time to probe pretty deeply into my loyalties and sympathies. In recognition of this I have done my utmost to cooperate by bringing forth what I think are the most essential points in question as may be seen from the correspondence on file. I have leaned backwards to explain myself. There is nothing that I have tried to conceal, camouflage, or confuse. On the contrary, I have been of the utmost frankness, and the suspicion expressed in this Court that I might try to put something over is without any foundation of fact.

At this point, may I be permitted to say a few words in connection with the two witnesses produced by Mr. Robert C. Wilson of the Naturalization Service, I mean Mr. Morley Osborn of Howell, and the Rev. Robert S. Steen, pastor of the First Presbyterian Church of Royal Oak.

Mr. Osborn under oath testified that he had become interested in me after hearing me speak in Howell, that from the first he thought I was a Nazi and even suspected at one time I was a Nazi spy; that he had arranged for the dinner

speech at a dinner meeting in the Eddystone Hotel in December of last year (1938); that he had a dictograph and took down my alleged speech; that as in my speech in Howell, I not only allegedly denounced Jews and Catholics, but defended Hitler.

Rev. Steen was far less positive and merely said that he thought that my alleged remarks on the anti-Jewish movement in Germany showed such warmth that I might really believe in it, but that he must admit that I did not present these views as mine but as an explanation of the Nazi point of view.

Unprepared for such an unfair and absolutely unjustified report I could not on the spot give it the answer it deserved.

Before dealing with Mr. Osborn, I want to stress the fact that I did not solicit the address at the Men's dinner in Howell. The Minister, Rev. Homer N. Noble, invited me to speak, as these letters prove. (Show letters)

To return to Mr. Osborn. First, it is untrue that I made a speech at that dinner. I had several telephone calls and, I believe, one visit from Mr. Osborn. I frankly admit that I had no desire to attend that dinner, but Mr. Osborn was so insistent that I said I would try to come if it were informal, that I certainly would not make a speech, and that I reserved the privilege of leaving soon after dinner, which I did. Possibly my annoyance at having to go at all colored my remarks during the dinner.

In one of our telephone calls Mr. Osborn proposed and later repeated in person to me that he would bring me in contact with Mr. Ford Hicks, the manager of the National Lecture Bureau in Chicago, to book me for a lecture tour if possible, and that he, Osborn, would like to act as my agent in Michigan, because as the representative of a New York publishing house he traveled around, had many connections and surely could place some worthwhile speaking

engagements for me,—with of course the usual commission for him, saying, and I remember his exact words, that “a little side money is always welcome.” The realization of Mr. Osborn’s pecuniary interest added to my annoyance at having been bothered with the dinner.

I am not a mind reader. Maybe the Gentleman from Livingstone county went sour because the “little side money” slipped out of his hands; maybe the self-appointed Sherlock Holmes and Secret Service men wanted to save the country from danger. However, the gentlemen, *under oath*, said a few things which are *definitely untrue*.

First, when at the advice of my wife who is present to testify, I finally accepted Mr. Osborn’s invitation, it is a fact that I did *not* make a speech. All I did was to answer questions. I may have elaborated on this or that, but at no point made propaganda in any way against Jews or Catholics. In answer to specific questions, I simply explained these things as the Nazis see it. *Nowadays many people without thought of the damage they inflict or without logic in asserting their position lightly brand anyone as a Communist, a Fascist, or a Nazi if he attempts to discuss these issues in an objective, rational manner.*

May I be permitted to observe that in neutral, free America, a year ago, nine months *before* the war broke out in Europe, the gentleman Mr. Osborn, lured me, a bona fide guest, into what he thought a trap and appeared at this hearing with a man of God to bring false testimony against me, an alien. I also point to the fact that when I *confronted* this gentleman, Mr. Osborn *on December 5th*, asking why he had proposed to bring me, whom he considered dangerous in touch with Mr. Hicks from Chicago, etc., etc., and whether he was not here because I turned him down and he could not make any money out of me, the gentleman exclaimed that he saw to it that Mr. Hicks would not book

any lectures for me, and that in fact Mr. Hicks had not done ~~it~~. So said Mr. Osborn *under oath*. However, here are the letters from Mr. Hicks proving that he did do business with me. (Show letters.) I quote . . .

So much for the veracity of Mr. Osborn. If Your Honor thinks it necessary to hear the testimony of my wife in connection with Mr. Osborn's propositions, she is here and ready to testify after I am through with my brief. [See pp. 85-6 of Appendix to Petition for Certiorari and the following Exhibit III, the affidavits of the said Rev. Steen and another guest at the said Osborn dinner, pp. 87-90 of said Appendix.]

However, if Your Honor is not convinced of my sincerity on this point I shall be only too glad to offer more proofs.

If any more evidence is needed as to my trustworthiness, I should like to produce a letter addressed to Your Honor. The letter is written by Claude Bragdon, one of America's foremost artists and a giant of thought, whom I have the honor to call my friend. Here is his autobiography, "More Lives Than One."

His letter to Your Honor reads as follows. (Quote and hand over letter) [Unfortunately, the copy of this letter of the late Claude Bragdon seems to be lost.]

This *Toronto Star* article, an interview I had last year with their staff reporter, Fred Griffin, who has known me since 1925, is further evidence of the change in me. (Quote)

My book, "I Knew Hitler" has been formally introduced as evidence into this case. (By the way, "I Knew Hitler" is banned in Germany.)

To me it seems to be established beyond question that in connection with this book, the new Ludecke should not be judged on the qualities or defects of the late Ludecke as reconstructed in the book, but solely on the literary and historical qualities or defects of the volume. If the Ameri-

cans wish to accept or reject good or bad writers as the classic Athenians accepted or rejected good or bad speakers, I calmly await the verdict.

May I quote some passages from a few reviews of my book as evidence of its value: Here is the review of the *New York Herald Tribune*, November 14, 1937:

"... His revelations regarding the rulers of the Third Reich are, by a wide margin, the most remarkable which have thus far appeared in print. This work is at once a breathless story of adventure and a political document of prime importance.

"Those who know little of national socialism, and care less, will find these pages utterly absorbing for their psychological content and exciting drama. Those seeking new insight into German Fascism will find them here in abundance. His pages move from climax to climax with the sweep of fiction but, instead of fiction, he offers a fully documented and elaborately indexed history..." (Prof. Frederick L. Schuman of Williams College, author of "The Nazi Dictatorship," etc.)

From the *New York Times*, November 28, 1937:
 "... This is an historic document written by Hitler's former director of propaganda in the United States. It is an inside view of Nazism given by a man of great analytical ability and writing talent. It rings true and is convincingly documented. . . . In future appraisals of the German leader, Kurt G. W. Ludecke's account will be indispensable. . . ." (Emil Lengyel, former chief of the New York Times bureau in Central Europe.)

From *Time Magazine*. "... He writes in English easily . . . frequent wit. His story is the most authentic and grimly absorbing Nazi confession that has yet appeared in English."

From *Current History Magazine*. "This is a sensational book, not for the sake of sensationalism, but for what it has to say."

From *The Nation*. "Here is a fascinating human document, the first important autobiography of an active Nazi. There are candid camera shots of Hitler the politician, the dreamer, the liar, the comedian, which are priceless.

"We get a deep insight into the fantastic part the German nation is pressed to play in Europe's great struggle—obscured by a thousand daily events—to achieve a modern organization.

"Whoever tries to understand the European Civil War should read Ludecke's book . . ."

From *The Detroit News*, December 19, 1937: ". . . I confess to having begun these 790 pages with the idea that Mr. Ludecke wrote them chiefly, if not solely, to strike back at his enemies. I finished them with considerable admiration for a man who, having gone through what Ludecke experienced, is able to write so objectively. . . ."

"If Mr. Ludecke has been vindictive, he has been skillfully so; and I, for one, incline to credit him with a sincerity which, under the circumstances, is remarkable.

"At all events, Mr. Ludecke has produced an intensely interesting book. Read it as history, or read it as romance, as you choose; it remains vivid, picturesque, and I believe, as a study of the characters of the men concerned, an effort toward objective truth." (By W. K. Kelsey, the well known commentator.)

"And here are some letters selected from many I have received from all parts of this country and abroad. (Quote.)

Not money, but letters like these are the real reward of an author. And it gives me satisfaction to know that there are some, apparently, who do not agree with the Court that I am "as dumb as an oyster in the shell."

In conclusion, may I recall a statement which Your Honor repeatedly and emphatically hurled at me, that I would fail to put anything over in this Court.

With equal emphasis I repeat that nothing is further from my intent. If I am guilty of anything in conducting my case, it is of the utmost frankness which I have shown from the very beginning.

I am an open book. I have nothing to hide or to conceal.

If the question of what I am going to do if granted citizenship—or not—arises, I can only say this: I shall continue to earn an honest livelihood as best I can. And now enjoying maturity of mind and independence of spirit, I shall serve Truth as I find it.

However, if freedom of thought and speech is permitted to one and denied to another, if, for instance, a man of German blood must become a coward and a liar to be eligible for citizenship—and that I cannot believe—then I prefer to remain a man without a country, but a welcome burgher of the eternal realm of truth, rather than live the life of a hypocrite and a living corpse.

“Tout comprendre est tout pardonner!” To understand all is to forgive all. In this spirit of goodwill, I shall be only too glad to shake hands with any honest gentile or Jew, black or yellow man, and help to get us a little closer to the goal of Universal Brotherhood.

Therefore, please Your Honor, do not see in the man now standing before you Hitler, or Nazi Germany, or the German-American Bund.

Here stands Kurt Ludecke, nothing and no one else.

Do not deny him the physical foundation for his spiritual aspirations.

One of the finest traits of the American people is their sense of fair play. I have faith that American justice will be given me.

That is all. I thank you.

The Brief speaks for itself. However, Relator's petition was denied that very same day in Court on December 18, 1939, “with prejudice” because of his “failure to prove

attachment to the principles of the Constitution of the United States."

Petitioner took a lawyer who filed a Notice of Appeal. Learning that an appeal without minutes of the hearings would be futile Petitioner wrote to Judge Tuttle on January 22, 1940, asking for an Opinion which was filed on February 26, 1940, (RB: 12-15). It may be emphasized that the said Opinion was not delivered or filed on December 18, 1939, the date of Judge Tuttle's denial of the petition, but *seventy days later* after this Petitioner had requested one.

When Petitioner heard from an American friend who had connections in Washington, that certain people there opposed his naturalization, he dropped his appeal because, under the circumstances, without even the minutes of the hearings in view of the then prevailing trends, attitudes and mounting propaganda an appeal would have been indeed sheer waste of energy and money. "You see, the old foggy had you licked from the start, when you stood before him without a Court stenographer making the report. You were at his mercy then, he knew that much right away . . ." was a remark made to Petitioner in the Clerk's office of the District Court (E. M.)—a remark he will never forget.

Looking backward, it is interesting to note that the said Opinion would never had been written, therefore, could not have been used against Petitioner, had he not himself asked for one, or had withdrawn his application at or after the hearing on December 5, 1939.

Anyway, the cat is out of the bag at last. For it seems that it is this ignoble Opinion which has served as the basis of operation against this Petitioner. It is ignoble because it teems with innuendoes, deliberate misinterpretations

and distortions of facts. The following may suffice to justify this accusation.

1) Judge Tuttle ignored in his Opinion the revealing and important letter of Dr. P. Roest (Exhibit II-A. 83-4) addressed to and left with the Judge at the hearing on December 18, 1939; the affidavit of the late Claude Bragdon on behalf of the Petitioner, also left with the Judge together with Dr. R's. letter; and the testimony of Mrs. Ludecke referred to in Relator's certiorari petition (see pp. 60-1 of petition).

2) Judge Tuttle ignored the Brief read to and left with him on December 18, 1939, an unanswerable argument that had disposed already of practically all the points raised in the said Opinion against this Petitioner.

3) Judge Tuttle states in his Opinion that.

"Several days after Hitler's rise to power in January 1933, the petitioner broadcast an appeal to Germans in the United States from Washington (p. 561) in which he stated 'America too needs a Hitler or a Mussolini.'"
(RB. 14)

However, the printed text on pp. 560 and 561 of I Knew Hitler reads as follows:

[Dr. K. Sell, the German representative of Wolff's telegraph Bureau—the former semi-official German news agency—]

"On February second . . . turned over to me five minutes of his *monthly broadcasting program to Germany*, allowing me to tell *Germany* the reaction in America to Hitler's success." [His appointment as Chancellor by Hindenburg.]

"With great excitement, I took the air for the first time in my life, a day or two after Chancellor Hitler's,

broadcast in Germany, relayed to this country by short wave. I told my countrymen:

"America, too, needs a Hitler or a Mussolini! Yes, if I were a German, I, too, would be a Hitlerite!" *So say many Americans today.*" [Italics Petitioner's.]

In the first place, Petitioner did *not* "broadcast an appeal to Germans in the United States" but to Germans in Germany, which is quite a difference. Fortunately, Petitioner made notes during the hearings which he elaborated at home. As a matter of fact it was the above mentioned Robert C. Wilson of the Naturalization Service who at the hearing on December 5 argued that Petitioner stated in his book that "America too needs a Hitler or a Mussolini." Petitioner's immediate objection that Mr. Wilson erred moved the Judge to look up page 561 and see for himself. After examining the passage he admitted that the form of presentation and the quotation marks at the proper place were evidence that Petitioner has quoted Americans and not expressed his own opinion in this exclamation. And Mr. Wilson's point was dismissed. Notwithstanding the honorable Judge found it honest, just and fair to repeat later in his own Opinion a version and interpretation he himself had dismissed as false in open Court.

4) Judge Tuttle states in his Opinion (RB. 15) that

"Two witnesses of good standing voluntarily appeared and testified as to the character of recent addresses made by petitioner, showing his lack of attachment to the principles of our Constitution and the slavish attachment to Hitler and the present German cause."

Petitioner has dealt with Mr. Osborn at length already in his Brief (see pp. 25-7 of this Reply-Brief) which he

repeats was read to and left with the Judge at the hearing on December 18, 1939. It may be added here, that Petitioner made it a point when writing the said Brief to treat this significant performance with restraint and not to emphasize the failure of the attempted smear. The truth is that Petitioner interrupted the witness Osborn and accused him in public of perjury, with the effect that Judge Tuttle did not persist but broke the testimony off and passed on to other things.

Yet His Honor found it honest, just and fair to climax his Opinion with "Two witnesses of good standing . . ."—one of whom committed perjury and was a flop, while the other, Rev. Robert S. Steen, B. D., testified nothing of the kind as his affidavit shows which gives Judge Tuttle the lie and appears as Exhibit III in the Appendix of Relator's Petition (A. 89-90). Also the affidavit of Mr. Christian T. Andersen supports Petitioner's statement. (Also Exhibit III—A. 86-88.)

Moreover, neither of the "Two witnesses"—not even Mr. Osborn—said a word of Petitioner's "slavish attachment to Hitler and the present German cause." That part is pure fabrication of the Judge. Petitioner never in his entire life has felt a "slavish" attachment to any person or to any thing. It simply is not in his nature. Finally, it must be noted, that Judge Tuttle did not state that he believed that this Petitioner was engaged in subversive or un-American activities or in any wise connected with any groups engaged in such. His verdict filed on December 18, 1939, with the Eastern District of Michigan, Southern Division, Petn. No. 119289, states only that the "reason for denial" was Petitioner's "Failure to prove attachment to the principles of the Constitution of the United States. With prejudice. Not to refile before five years from date."

That Judge Tuttle seventy days later thought it compati-

ble with the dignity of the Bench, the responsibility of his office, with the oath he took when appointed a Federal Judge to write that ignoble opinion, that is his business but should not be held against this bona fide Petitioner. Moreover, even that unfair verdict would have allowed Petitioner to refile a petition for naturalization on December 19, 1944, and as a matter of fact and ~~in~~ record he tried to do so, but

In view of these undeniable facts, Petitioner prays that the Honorable Supreme Court ignore the said Opinion of the late Judge Tuttle introduced by Respondent in his Brief under Appendix B (RB. 12-15) or in the alternative order an investigation to establish beyond any doubt the true facts regarding that Opinion. Petitioner has more evidence in his possession and there are witnesses ready to testify in his behalf. Moreover, there are good reasons to hold that the said Opinion indeed served as the basis and an instrument to persecute and torture this Petitioner. Or is it not persecution and mental torture to which Petitioner has been subjected ever since the denial of his petition for naturalization in 1939, when he was not even permitted to leave this country for Mexico early in 1941, ten months before Pearl Harbor, where he wished to live more economically and in peace of mind to finish work on a book; when he is kept a prisoner for *six years* without reason and cause and ordered deported as a "dangerous" animal to perpetual misery in Germany?

Like any free-born citizen of the world, this Petitioner abhors to be at the mercy or in the power of any man. Sure enough, it's an old story that people with too much leather about their consciences, who spit in the very face of their own God, are indignant and find it shocking when put in their place. Of course, it may well be that Respondent knew not about the Brief Petitioner read to and left with Judge

Tuttle, though he enclosed a copy of it in his letter of January 16, 1946, to the Attorney General.

Not for one moment, does this Petitioner contest the right and the power of the Government to remove an alien, if there is specific, real and substantial evidence to justify the charge that he is "dangerous." But the assertion that an Attorney General, his delegate or some obscure board can act as jailer, prosecutor, judge and jury, all in one, and thus destroy the character and livelihood, the health and the very life of an honest man of goodwill, without due process of law, be he a citizen or an alien, especially in this country which enjoys the tradition and the philosophy, the ideals and the principles of a true democracy of Equality, proclaimed in the Declaration of Independence, is too preposterous to deserve further comment. It is said that quibbles are to be met with quibbles; but there are times when the queer, crooked, yet formal paths of casuistic and legalistic procedure bordered with invalid precedents must be rebuilt into straight paths of right and common sense bordered with the eternal precedents of Truth.

Finally, it may be appropriate to direct attention to the fact that it is the Government, which is sponsoring through the "Freedom Train" a program designed to the rededication of all citizens to the basic American principles (dealt with at length in Petitioner's arguments and briefs). Should not therefore all public servants in every branch of the Government set a shining example in applying these basic American principles in practical terms, especially in these days when the most fundamental human rights are violated with utter ruthlessness in a calculated, systematic degradation of man and cynical contempt of the integrity of the individual human being not only by blind and despotic leaders, but also by arrogant and irresponsible bureaucrats corrupted and drunk with power?

The Editorial "Created Equal" of the New York Times of October 31, rightly says:

"The central point in the report of the President's Committee on Civil Rights is the reaffirmation of an old principle—one too often misunderstood, ignored and even jeered at in these days. This is, as Thomas Jefferson wrote in the Declaration of Independence, that 'all men are created equal.' The words never meant that all men were equal in intelligence, physical strength or character. They meant that all men were equal before the law. They have come to mean more: that men are equal, in the language of this report, in 'an essential dignity and integrity.'"

The study of the said Report published in the New York Times of October 30, 1947, offers indeed much food for thought. Of particular interest, in connection with the instant case and altogether with the shameful treatment of the German civilian internees still held at Ellis Island as "dangerous alien enemies subject to removal" without due process of law, is the following passage of the Report:

"... We need no further justification for a broad and immediate program than the need to reaffirm our faith in the traditional American morality. The pervasive gap between our aims and what we actually do is creating a kind of moral dry rot which eats away at the emotional and rational bases of democratic beliefs. There are times when the difference between what we preach about civil rights and what we practice is shockingly illustrated by individual outrages. There are times when the whole structure of our ideology is made ridiculous by individual instances. And there are certain continuing, quiet omnipresent practices which do irreparable damage to our beliefs."

"... The damage to those who are responsible for these violations of our moral standards may well be greater. They, too, have been reared to honor the com-

mand of 'free and equal.' And all of us must share in the shame at the growth of hypocrisies . . . All of us must endure the cynicism about democratic values which our failures breed."

"The United States can no longer countenance these burdens on its common conscience, these inroads on its moral fiber."

After receipt of the Report of his Civil Rights Committee the President of the United States said inter alia in his published Statement these memorable words:

" . . . I notice that the title of this Report is taken from the Declaration of Independence. I hope this committee has given us as broad a document as that—an American charter of human freedom in our time.

"The need for such a charter was never greater than at this moment. Men of good-will everywhere are striving under great difficulties to create a world-wide moral order, firmly established in the life of nations.

"For us, here in America, a new charter of human freedom will be a guide for action; and in the eyes of the world, it will be a declaration of our renewed faith in the American goal—the integrity of the individual human being, sustained by the moral consensus of the whole nation protected by a government based on equal freedom under just laws."

The attitude and procedure of the Department of Justice in the instant case certainly are contrary to American tradition and morality, to American principles and justice, as they are contrary to the will, the faith and the spirit expressed in the above quoted Statement of the First Public Servant of this great land.

If the President of the United States really means what he says, and this Petitioner believes and hopes that he does, is it not then the duty of every public servant in this country, high and low, to do his very best to live up to the Spirit and

to the Law of the American Purpose acknowledged and reaffirmed by his Chief, the President of the United States?

Finally, if more proof is needed to show that in the instant case the Department of Justice indeed is not only defending an untenable position but is actually contradicting itself and defeating its own intent and purpose, here is another striking document, the **WORLD RIGHTS BILL** proposed by the United States. The report of the New York Times of December 1—47, page ten, reads in part as follows:

"A World Bill Of Rights . . . was proposed on behalf of the United States today by Mrs. Franklin D. Roosevelt . . . United States representative to the United Nations Commission on Human Rights. . . .

"The document is the work of officials from the State, **JUSTICE**, Labor and Interior Departments. The State Department said in announcing the text that 'even though all these rights are not immediately obtainable by everyone everywhere in the world, they are included on the theory that they are *fundamental and should be the rights of every individual*.' [Italics are Petitioner's.]

"Following is the text of the United States proposal:

PROPOSAL FOR A DECLARATION OF HUMAN RIGHTS

Whereas, by the Charter of the United Nations all members affirm their faith in the dignity and worth of the human person and pledge themselves to cooperate in promoting respect for human rights and fundamental freedoms for all.

Now, therefore the General Assembly of the United Nations resolves to set forth in a solemn declaration these essential rights and fundamental freedoms of man, and calls upon the peoples of the world to promote the rights and freedoms hereby proclaimed.

ARTICLE I. Everyone is entitled to life, liberty, and equal protection under law.

ARTICLE II. Everyone has the right to freedom of information, speech, and expression; to freedom of religion, conscience, and belief; to freedom of assembly and of association; and to freedom to petition his government and the United Nations.

ARTICLE III. No one shall be subjected to unreasonable interference with his privacy, family, home, correspondence or reputation. No one shall be arbitrarily deprived of his property.

ARTICLE IV. There shall be liberty to move freely from place to place within the state, to emigrate, and to seek asylum from persecution.

ARTICLE V. No one shall be held in slavery or involuntary servitude. No one shall be subjected to torture, or to cruel or inhuman punishment or indignity.

ARTICLE VI. *No one shall be subjected to arbitrary arrest or detention. Anyone who is arrested has the right to be promptly informed of the charges against him, and to trial within a reasonable time or to be released.* [Italics are Petitioner's.]

ARTICLE VII. Everyone, in the determination of his rights and obligations, is entitled to a fair hearing before an *independent* and *impartial* tribunal and to the aid of counsel. No one shall be convicted or punished for crime except after public trial pursuant to law in effect at the time of the commission of the act charged: *Everyone, regardless of office or status,* is subject to the rule of law. [Italics are Petitioner's.]

ARTICLE X. *Everyone, everywhere in the world, is entitled to the human rights and fundamental freedoms set forth in this declaration without distinction as to race, sex, language, or religion. The full exercise of these rights requires recognition of the rights of*

others and protection by law of the freedom, general welfare and security of all.

No sane and honest person in the world will deny, that in the light of the proposed World Bill Of Rights the Alien Enemy Act of 1798 is inadequate and obsolete, and that the dishonest interpretation and inhuman application of this Act in the instant case is not only a flagrant violation of acknowledged Natural and Moral Law as well as established National Law, but also definitely and absolutely contrary to the spirit of and to the letter of the International Law manifest in the World Bill Of Rights, which the Government of the United States of which this very same Department of Justice is a vital part is offering for adoption by the United Nations of the world.

Summing up this point, Petitioner respectfully submits that Respondent has shown no valid reason whatever why the Judgment of the Court below should NOT be reversed, therefore prays that the Court disregard Respondent's Brief.

11. The principal question presented in the instant case includes another question, which considering the terrible experiences punishing us in our time is of particular importance, namely, the question: Is there a legal wrong?

Already Cicero has answered this fundamental question. In his paper "*De legibus*" he asks inter alia, what to think of a law decreed by a dictator empowering him to execute every one of his subjects at will without judicial procedure ("*ut dictator quem vellet civium indicta causa impune posset occidere*").

The Roman jurist reached the conclusion, that such an extremely inhuman law ("*lex inhumanissima*") is unjust and has no legal validity. We know today for certain, and this insight has found an immortal expression in the Declaration of Independence, what man divined from time im-

memorial, that there are eternal laws removed from human arbitrariness, supreme principles of Right and immutable standards, which are not only of an ethical nature but first norms of the most elementary kind, superior to all so-called positive law sanctioned by State Statute and superseding it whenever contrary to these. The Declaration of Independence put on paper what follows of itself as a logical consequence from natural and moral laws written into the heart of man, and what centuries of culture and civilization recognized as a commandment of self-respect and reason.

Already 1625 long before Goethe and Schiller, Blackstone and Kent, the Dutch thinker Hugo Grotius in his famous "*De jure belli et pacis*" speaks of the "*observatio juris naturalis ac divini ad quam reges omnes tenentur*," And John Locke ("*Two Treatises On Government* 1689"), who influenced Tom Paine who influenced Jefferson, knew likewise the boundaries of executive power and taught the inalienability of basic human rights and the right of resistance against executive power, which arbitrarily disregards these rights.

That such a Divine Order of Right is a most uncertain thing, is an objection which is not valid. It is undeniably inner experience, that we have in our heart an infallible gauge telling us, which human statutes are incompatible with the Divine Law: our clear consciousness of Right. In our conscience we hear the voice of God, which unfailingly and incorruptibly calls, where the Right ends and where the Wrong begins. We must learn again to harken to this pure unerring voice and sharpen our ears for the will of God. The commandments and rules of human life and community are sunk in our hearts by the creator of all things, born with us, as it were, "*jura divina quadam providentia constituta*," as is said already in Justinian's Institutions. We

do not make them, we can but find them. They are indeed a gift from heaven, "in our conscience planted by God," in the words of Ernst Moritz Arndt. The earthly state and its codes and statutes are never an end in itself. They are there to serve us the living, not the dead, the means for the higher purpose, to help us, not to hinder us, in our efforts to reach and to fulfill our destiny as willed by God. It is a double maxim that right is what profits the state. Only that is truly profitable and of lasting value, what is consonant with the Eternal Law of God. *Nihil est utile, quod non est honestum*, already Cicero said. We must recognize, that also the state can do wrong and that high above him there reigns the Law Absolute, which according to Plato though for ever immutable man may find in his soul as revelation of God. We must learn that none of us will obey, no judge will apply, no official will enforce, a public Statute which is in clear conflict with the supreme principles of the Absolute Law of God. Only when the state in his legislation is obedient to the Law of God, has the state the right to demand obedience from his people. And if not, then particularly the judge—should he not wish to resign—must administer justice *contra legem*, not according to arbitrary opinions of his own, but obedient to his conscience in harmony with God. An independent Judge conscious of his responsibility will not in false loyalty to the letter of the "law" prostitute his self to apply a "right" the result of which would mean disregard of the Eternal Right and lead to the prostitution of Justice.

We learned a lesson from the greatest show in world tribunal history, the public trial of the major Nazi criminals at Nuremberg, where men were hanged to set an example for all the world to see, that **Might Does Not Make Right**, and that crimes even if "legally" committed in the name of the state by the highest executives of the state are crimes

which must be punished. And Justice Jackson rightly emphasized in his report on the Nuremberg-trial, that more important than the personal fate of the Nazi leaders are the principles, that these principles, now backed by the power of precedent, constitute the basic charter of international law, and that this law applies not only to the Nazi leaders but to all men everywhere; and that it is incumbent upon all victors to review their own politics and practices in the light of the new law.

Considering the facts, the questions and reasons presented, is it then too much, if all that what this Petitioner asks and prays for is to *accord him due process of law*—a right which was granted even the criminals at Nuremberg before they went to their ignoble death—to *determine* the question of whether or no he is dangerous to the public peace of the United States.

Summing up it is for this Honorable The Supreme Court of the United States to decide, whether or no the old legal principle should be invoked that *cessante ratione cessat lex ipsa*, and whether the instant case is to be judged on the basis of totalitarian justice governed by American godlessness, or on the basis of true American justice governed by recognized Natural Law and established National Law in this dear land, which is supposed to have a Government of Law and not a government of men. (In this connection, special attention is called to the famous Dred Scott case mentioned in Petitioner's, that is, APPELLANT'S BRIEF. (A. 108, 109, 116, 117.)

12. After an honest examination, without prejudice, of the evidence and argument submitted in this Brief and Appendix, the conclusion is inevitable that Petitioner is not only ~~not~~ dangerous but a useful and constructive member of society, a law-abiding, honest and legally admitted alien resident of goodwill who has been wronged, that his con-

tinued imprisonment and ordered deportation, particularly considering the appalling conditions in Germany, *without due process of law*, and altogether the entire procedure adopted by the Department of Justice is a mockery of justice, un-American and dishonest, arbitrary and illegal, because it is, first, a violation of the Alien Enemy Act itself which was never meant to serve such inhuman proceedings, and second, a flagrant violation of recognized Natural Law and established National and Constitutional Law.

It is a matter of record and a significant fact (1) that Petitioner, simply because he insisted already in Germany on principles, decency, and law, rotted eight months in Nazi concentration camps until his escape to the United States in 1934; (2) that nevertheless he was interned in this country as a potentially dangerous *pro*-Nazi; and (3) that he was so abused and persecuted as an *anti*-Nazi in various camps by other German internees (practically all of whom have been repatriated or released [!!] in the meantime), that Mr. W. F. Kelly, Asst. Commissioner for Alien Control, I. & N. Service, Philadelphia, Pa., granted his request and transferred him to a "quiet" camp near Algiers, La.

For the record, it may be added now that Petitioner, well aware of the then prevailing attitudes and trends, anticipated complications and difficulties as to his particular case, therefore, from the very beginning of his imprisonment made it a special point to put Statements on record showing his attitude and his convictions, and took good care to prove by his conduct that he was doing his best to live up to his convictions. And it is too a matter of record that Petitioner—whatever his shortcomings and weaknesses—never wavered through all these years nor changed his basic attitude to life and the important things. (See his various Statements etc. included in the Transcript of Record and Certiorari Petition.)

Anyway, there is the unanimous decision of the nationally known Circuit Judges, the Hon. L. Hand, Swan and Augustus N. Hand, stating inter alia that "justice may perhaps be better satisfied, if a reconsideration be given him in the light of the changed conditions . . ."

However, so far, the Department of Justice did not reconsider in spite of this Opinion and in spite of the recommendation of his release, so Petitioner learns, by the Senator Langer-Shoemaker-Rothstein Committee mentioned above.

The fact must be stressed that the Supreme Court in deciding against this Petitioner at the same time publicly and officially adopts and confirms the notorious Opinion of Judge Simon H. Rifkind, dated August 6, 1946, in *United States ex rel. Schlueter v. Watkins*, used by Respondent as the principal precedent against Petitioner, which stated that alien enemies have no rights whatever and can be imprisoned and deported at will "without a court order and without a hearing of any kind," i. e., without due process of law.

Moreover, in doing so the Supreme Court of the United States is giving official notice for all the world to know, (1) that an honest and law-abiding, legally admitted bona fide alien resident of goodwill, even before he can lawfully be classified as an "alien enemy," is outside the pale of law, therefore without legal protection in the United States and at the mercy of arbitrary and irresponsible officials of the Government, hence exposed to persecution, mental torture, indefinite imprisonment and finally deportation to more misery and maybe death, even without the possibility of appeal and redress; (2) that the immigration and naturalization policy of the Department of Justice has undergone a radical change in perfect agreement with the actual Supreme Court and that the high-souled and high-sound-

ing statements in *Our Constitution and Government—Federal Textbook on Citizenship*, published by the Department of Justice in 1941 (!) for naturalization applicants (see pp. 144-45 of Appendix to certiorari petition), are not worth the paper they are printed on; (3) that in case of another global conflict, this time between the United States and Soviet Russia and a more or less bolshevized Europe and Asia, any legally admitted alien resident of the millions of such aliens here and in Latin America, turned overnight into alien enemies, may suffer the fate of this Petitioner, for instance, however unjustly, as explained on pp. 99-101 of his certiorari petition; (4) that in the opinion of this Honorable Court the American Declaration of Independence is not valid, therefore not binding and does not mean a thing in practical terms, even though it is the Birth Certificate of this nation which Lincoln said is "an abstract truth, applicable to all men and all times;" even though it is—in one way or another—however inadequately incorporated as a Bill of Rights in 47 of 48 Constitutions of the United States and in the Federal Constitution as well; even though it is the First Law of the land for reasons explained in detail in Petitioner's certiorari petition and Appellant's Brief (see pp. 94-117); in other words, that in the eyes of the present Supreme Court of the United States the basic principle, the very core of American democracy, and ideal of the American Purpose, do not count, and that the many official statements, declarations, and lofty promises made by American Presidents, Judges, Statesmen, and Public Servants in the highest places, as quoted in the various papers of Relator's certiorari petition, are mere words and sham; or finally (5) that perhaps this Court holds that a German alien enemy is *not* a human being, to whom the Declaration of Independence would apply, but a lower animal, therefore has no unalienable rights, hence

as a last resort must appeal to the goodwill of the American Society For The Prevention Of Cruelty To Animals.

However, Petitioner cannot bring himself to believe that this Honorable Court will betray the high trust committed to his charge. There is too much at stake: American principles, American justice, American honor, and last but not least, the judicial honesty of this Court, the Supreme Court of the United States, which one day will be judged by History and stand before the Bar of God.

Because of the vital issues involved, Petitioner from the very beginning of his ordeal has been careful, on the one hand, to base his argument on wholesome precedents and the sound reasoning of honest and mature Americans, and on the other, to support his own interpretations and conclusions with public statements of American public servants. Here is a telling statement of Robert E. Cushman, according to the *New York Times* one of the country's leading authorities on civil rights, director of researches in civil liberties at Cornell University, author of several books, and member of the President's Committee on Civil Rights, who in an article *Our Civil Rights Become a World Issue* in the N. Y. T. Magazine of January 11, 1948, inter alia has this to say:

Now that the war is over, this nation finds itself the most powerful spokesman for the democratic way of life, as opposed to the principles of a totalitarian state. It is unpleasant to have the Russians publicize our continued lynchings, our Jim Crow statutes and customs, our anti-Semitic discriminations, and our witch-hunts; but is it undeserved? Some of the flung mud sticks. We cannot deny the truth of the charges; we are becoming aware that we do not practice the civil liberty we preach; and this realization is a wholesome thing.

If Mr. Cushman and the American people at large would know of the un-American, outrageous, and arbitrary treat-

ment decent civilian internees have to suffer at the hand of the "conspiratorial clique" at Washington whose influence is still at work according to alarmed Senators and observers, they certainly would include this pitiful fact among the above mentioned charges.

Dr. Douglas M. Kelley, a former Army psychiatrist who was responsible for the mental health of the major war criminals, Goering et al., at the Nuremberg prison, in an official report says the following:

Most Americans feel that, although the Germans may have followed such leaders, members of other civilized communities certainly would not be taken in by such 'pathological personalities.'

As a result of this sentiment, no one seems to take seriously the possibility that a similar group could be organized again. The lesson to be learned from the Nuremberg tests is that such personalities as the Nazi leaders who are totally ruthless can be duplicated in any country. Given the opportunity, a group of men of similar personalities could be found who would not hesitate to climb over the bodies of half the people in America to gain control of the other half.

(New York Times of April 26, 1947.)

A timely warning indeed! For the forces at work in all countries are fundamentally the same, and so are the potentialities of human nature. Americans will escape these evils only if they recognize that the danger to which Germany was one of the first to succumb is a common danger.

The Honorable Tom C. Clark, Attorney General of the United States, in an address to the New York Bar Association, asserted that on the question of investigations under the President's loyalty order individuals under inquiry were assured of:

A fair, open hearing with counsel, witnesses, the right of cross-examination and two possible appeals.

... We don't intend to take any action until we can prove it . . . there will be no charges of disloyalty until we have the evidence.

(New York Times, January 24, 1948.)

That much now is conceded to Federal employees who after all face only discharge from office and that only if proven *disloyal* to their Government; whereas their fellow-men, decent and *loyal* civilian internees, at the mercy of some obscure influences and brutally branded as "dangerous alien enemies"—without any proof, without any specific charges,—for no good reason whatever can be imprisoned, persecuted, deported to more misery and maybe death in prostrate Germany, without even the possibility of appeal, because it is alleged that they have no rights, therefore are condemned "without a hearing of any kind."

But let us be reminded of the words of John Adams, the second President of the United States, who said:

You have rights antecedent to all earthly government; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe.

The unalienable right are inherent, and to guarantee and secure them to us governments were instituted among men. If the United States is to stand before the world as an exemplar of equality of rights, if it is to urge with integrity the acceptance by the rest of the world of the tenets and practices of a democratic society, then it would be well and high time if they set their own record straight.

In conclusion, Petitioner solemnly declares that it is his fervent wish to create a wholesome precedent for the sake of Truth and Liberty and Justice for all men, and last but not least for the sake of the Honor of the American people he loves who must not fail this time to become the moral

leader of the world, for man's present problems are essentially moral ones. And the world's most important problem—justice for men and the establishment of the Brotherhood of Man and the Fatherhood of God in ONE WORLD—has been an important problem for some time. Subject to the law of evolution as all things human are, also human law and human justice are the gradual expressions of the moral judgments of the civilized world. Therefore, human law and human justice—not looking backward but looking forward—should advance with the times and create new and ever higher precedents. Truth alone will make us free. So with Lincoln "Let us have faith that right makes might; and in that faith let us to the end, dare to do our duty as we understand it!"

If soldiers have to die on foreign battlefields for principles and ideals at the command of those who, safe and smug at home, are ready to betray these very same ideals as soon as real or imagined emergencies are past, then the least an honest man can do, be he a prisoner or free, is to stand up and speak the truth as best he can while he can. Therefore, Petitioner, realizing how much there is at stake, passionately flings the truth in the teeth of an obstinate reality that will not conform to it; and inadequately and feebly he knows, yet with all his soul desiring to move this August Court, appeals to the judicial honesty and conscience of the nine Justices representing the Soul and the Conscience of America to really administer justice in this all important case; and, for the record, he uses this last opportunity to appeal also to the conscience of the counsel of Respondent, the Honorable Philip B. Perlman, Solicitor General of the United States, and his associates, to desist and abandon an untenable position that is unworthy of the American Purpose, Ideals, and Traditions, for denial of the

instant cause at the same time is the denial and annulment of the Declaration of Independence, the First Law of the Land.

Conclusion

It is respectfully submitted that, for the reasons set forth above, the judgment of the Court below should be reversed and the cause remanded to the District Court with direction for such further relief as this Court may deem just and proper, or, in the alternative, the judgments should be reversed and Petitioner admitted to parole pending final disposition of his case in a full judicial hearing with due process of law to establish the truth.

KURT G. W. LUDECKE,
Petitioner,
Attorney in Person.

Washington, D. C.
April, 1948.

Supplement

The Court entered on April 19, 1948, the following order in the case LUDECKE v. WATKINS, etc., No. 723, October Term, 1947:

Leave is granted petitioner to file in typewritten form, as an appendix to his brief, the material appended to his petition for a writ of certiorari.

The petitioner is requested to respond to the letter of the Solicitor General dated April 9, 1948, relating to a change of circumstances, and both parties are directed to brief and argue the question whether the cause is moot.

In view of the fact that Petitioner—because of cogent reasons already submitted in his letter of April 16 to Mr. H. B. Willey, Deputy Clerk, for presentation to the Court,

further because of the new complications and time devouring study of the "moot" point raised by the Solicitor General, finally because of the mass of work of different kind weighing down the worn-out Petitioner already harassed by the pressure of time,—is so wrought up emotionally, and so exhausted physically and mentally, that he is near the breaking point, therefore, par force majeure could not devote sufficient time nor care to said "moot" point of which the Clerk was advised on April 9, but this Petitioner learned only through the letter from the Clerk dated April 19.

Had Petitioner received a copy of the said letter of the Solicitor General dated April 9 at a proper time, he would have considered his returning to Ellis Island, but learning of it at such a late date when practically two thirds of his temporary parole had past, he decided against it because of the definite arrangements he already had made here in Washington in connection with his certiorari work and Oral Argument set for April 30.

Therefore, since the Respondent failed to inform him in due time, Your Petitioner respectfully submits that the Court disregard the said letter of the Solicitor General as well as the question whether "the cause is moot."

Further Petitioner holds that the instant cause has NOT become moot by virtue of his merely temporary release on parole from custody which is very problematic indeed already for the simple fact that his reimprisonment so very near is hanging like the proverbial Damocles sword over his head; and that the case of *Baker v. Hunter*, No. 151, October Term, 1944, dismissed as moot, 323 U. S. 740, (referred to in said letter of the Solicitor General), under no circumstances, should be admitted to serve as precedent for this case.

After examining the printed matter filed in said case,

Petitioner came to the inescapable conclusion that the *Baker v. Hunter* case is absolutely and completely different from the instant case, as to background and issues involved, as well as factually, legally, morally, psychologically, and otherwise, therefore cannot possibly serve as a valid precedent. Moreover, the Solicitor General himself states that there is "good ground for the contention that the matter is not moot" and refers to the *Altieri* case relying on the cases of *Jaegeler v. Carusi*, and *Lindenau v. Watkins*, which so far Petitioner had not the time to look at for closer examination.

Anyway, it should be inadmissible eo ipso and per se to present such mental acrobatics springing from quibbling and false thinking afraid to face the truth, in order to kill a great case that deals with fundamentals involving higher interests and touching ultimate issues.

Furthermore, the "moot" question raised by the Solicitor General is incompetent, irrelevant, and immaterial, also for other reasons stated below.

After the denial of his Motion For Action On Petition For Rehearing Petitioner most reluctantly had to persuade himself, that there is no American justice, therefore,—convinced that Laughlin would lose the case of *Ahrens et al. v. Tom C. Clark*,—decided that, under the pressure of crushing circumstances, even only the relative liberty of action under the restraining regulations of temporary parole of a so-called alien enemy (which he is not) was imperative, therefore for him a question of to be or not to be. Hence, Petitioner made a tremendous physical and spiritual effort to break through all the adversities overwhelming him and at last on March 30th—after on March 23 his writ of habeas corpus for voluntary departure was brutally dismissed without even his brief having been examined, and after his application for parole (according to information

received) on March 29 was denied by the Attorney General himself,—succeeded to obtain a parole of thirty days to effect his voluntary departure with the proviso explicitly stated in his applications submitted to Mr. W. F. Kelly, Assistant Commissioner and director of the alien Parole section of the Immigration and Naturalization Service at Philadelphia, and to Mr. George S. German, Chief, Alien Parole Section at Ellis Island, that he would definitely prefer to stay in America if allowed to do so.

Considering the situation at the time, it must be remembered that should Laughlin lose the *Ahrens* case this Petitioner as well as all the other internees would no longer be protected by law but definitely be at the mercy of the Department of Justice that might treat him and others as it had treated one Bishop, also an "alien enemy," who was deported early in the morning the very day after he had lost his case in Court. Therefore, and because Petitioner simply could not stand it any longer at Ellis Island for reasons submitted in said Motion For Action On Petition For Rehearing (denied on March 8), he had no other choice but to exact parole for voluntary departure, the only avenue left open to him to make a last effort to obtain his release and satisfy himself, as every fiber of his being cried out for action and a change of air. That is why after a few days in New York necessary to reorientate himself (having been out of circulation for six years and five months), he left for Philadelphia and Washington, where in the morning of April 8 Mr. Rothstein, Director of the alien control unit of the Department of Justice, with whom he had a talk the previous day, telephoned Petitioner that the Court had granted his certiorari after all. It was the surprise of his life. Could he have foreseen or even only thought of the slightest possibility of the amazing and absolutely unexpected development, Petitioner certainly

would have waited and would not have applied for parole. But as things stood at the time and because of urgent personal problems confronting him, Petitioner had to act as he did.

Thus, the foregoing being the background of "the question whether the case is moot" your Petitioner asks, can the present situation possibly be compared to the situation of Norman G. Baker whose case referred to by the Solicitor General, was dismissed as moot? There is no parallel whatsoever. Here is the fundamental difference.

According to the official Transcript of Record of No. 151, October Term, 1943, Norman Baker, Petitioner, on the basis of *due process of law*, was properly indicted, properly convicted on verdict of guilty of an actually committed crime, and properly sentenced on January 25, 1940, to four years imprisonment in a penitentiary. However, Baker, properly convicted criminal, elected to remain in the Pulaski County Jail pending appeal, instead of beginning sentence in the Federal Prison. Defendant's appeal was determined on March 13, 1941, and after 14 months in said county jail defendant was delivered on March 22, 1941, to U. S. Penitentiary at Leavenworth, Kansas. While imprisoned in the federal institution, he earned 336 days good time, but was released from respondent's actual custody on July 19, 1944. This time, together with the time actually served, and the fourteen months he spent in County Jail, exceeds the maximum four years sentence which was imposed. Ergo, Baker by habeas corpus proceedings sought to obtain his release from the custody of the Warden of the Federal Penitentiary contending that time spent in the county jail, pending appeal and affirmation of his conviction, should be applied and credited to the sentence imposed. Apparently, in the course of this litigation, after having been released on parole and after the Solicitor General had suggested to the

Court that the cause had become moot, because Baker was released from custody on July 19, 1944, and that the petition for a writ of certiorari should therefore be denied, Baker insisted that being entitled to credit upon his sentence for the fourteen months spent in the county jail, when the petition for certiorari was filed, he was entitled to *complete liberty* . . . However, the case was dismissed as moot on the ground that Petitioner had been released from custody upon his completion of the minimum term imposed under the sentence mentioned above.

During Ludecke's proceedings in the District Court, and his appeal to the Circuit Court, he was confined to Ellis Island in custody of the District Director of the Immigration and Naturalization Service pursuant to an order of removal issued by the Attorney General directing petitioner's removal to Germany.

After application had been made to this Court by petitioner Ludecke for a writ of certiorari petitioner was conditionally released on parole. The conditions on which he was released are set forth in the following agreement which petitioner was compelled to sign before he was released:

Parolee's Agreement

March 31, 1948.

I, Kurt George Wilhelm Ludecke, a national of Germany, in consideration of my parole under regulations relating to alien enemies, hereby agree to keep in close touch with Inspector Joseph Judge, Immigration and Naturalization Service, Ellis Island, New York, and to that end I agree to report to him by 'phone on Thursdays during this period between the hours of 9:30 a. m. and 4 p. m. (Whitehall 38877, Ext. 85). I also agree to comply with all provisions of the regulations pertaining to alien enemies and with all the terms of my parole.

I understand that I am being granted a 30-day parole for the express purpose of effecting my departure from the United States under the outstanding removal order issued by the Attorney General, in my case. I agree that if I cannot produce a visa or evidence that it can be obtained and depart from the United States on or before May 1, 1948 under the outstanding removal order, as stated in my letter of March 26, 1948, I will surrender to Ellis Island not later than the 3:45 p. m. ferry on Monday, May 3, 1948 for immediate involuntary removal to Germany.

(Sg.) KURT LUDECKE.

P.S. I further agree that the appeal for a rehearing submitted on March 30, 1948, to the Southern District of New York, will be withdrawn and habeas corpus proceedings discontinued.

(Sg.) KURT LUDECKE.

From this agreement it is clear that petitioner has not been unconditionally released, but upon expiration of the parole period is subject to being again interned on Ellis Island, and in addition is subject to immediate involuntary removal to Germany, despite the fact that under the law he has the right of voluntary departure which right necessarily includes the right to choose the country to which he desires to go. Further the petitioner is continually subject to the jurisdiction of said Director, who at his discretion may impose additional conditions, or even curtail the parole.

These conditions and limitations on petitioner Ludecke's liberty clearly distinguish the parole in his case from the conditions which prevail in the case of *Baker v. Hunter*, 323 U. S. 740 relied on by respondent. In the Baker case the petitioner was released from prison pursuant to law after he had served a sentence based on a criminal conviction. Baker was free and not subject to re-arrest or re-con-

finement at the end of a certain limited period, as is petitioner Ludecke.

Ludecke's parole is not pursuant to any provision of law. It is limited to thirty days. At its expiration he must return to Ellis Island to be confined. Baker was released because the law required it. Ludecke was paroled at the whim and fancy of respondent, who can take him into custody again at any time, as he actually has done in other cases of alien enemies interned at Ellis Island. The fundamental difference between the cases is that Baker knew that he could insist upon his rights under the provisions of due process of law, while Ludecke has repeatedly been told by respondent that he has no rights, which respondent must respect, because he is an alien enemy.

Petitioner Ludecke while on parole is subject to such conditions and restrictions imposed by respondent as to constitute a restraint on his liberty. Such restraint is sufficient to support issuance of a writ of habeas corpus. Actual confinement in jail, or detention on Ellis Island, is not necessary. To restrain means to check, confine, curb, forbid, hinder, impede, limit, prevent and to obstruct.

Couge v. Hart, 250 Fed. 802, 803;

Chicago Packing Co. v. Chicago, 88 Ill. 221, 226;

Ogden v. Wisconsin, 111 Wisc. 413, 419, 87 N. Y. 568;

Smith v. Madison, 7 Ind. 86, 89.

Any restraint which precluded freedom of action is sufficient. The test is the existence of such imprisonment or detention, actual though it may not be, as deprives one of the privilege of going when and where he pleases; whether there is actual confinement, or the present means of enforcing it.

Chin Yow v. U. S., 208 U. S. 8;

U. S. v. Yung Ah Lung, 124 U. S. 621;

Wales v. Whitney, 114 U. S. 564; .

U. S. ex rel. Alterie v. Flint, 142 Fed. 2d 62, affmg.
54 Fed. Supp. 889;

U. S. ex rel. Jaegeler v. Ugo Carusi, Dist. Ct. Philadel-
phia, case No. M-1213;

U. S. ex rel. Lindenau, v. Watkins, South. Dist. Ct.
New York case No. Civ. 41-547.

In *Wales v. Whitney* it was held that more than moral restraint is necessary to make a case for *habeas corpus*; that there must be actual confinement or the present means of enforcing it. There can be no dispute that respondent has the means at present of terminating Ludecke's parole and again confining him at Ellis Island.

In *Chin Yow v. U. S.* involving a Chinese who was refused permission to land in the United States, it was held, even though he was not in the custody of any United States official, that such refusal was a sufficient restraint of the relator's liberty to entitle him to obtain a writ of *habeas corpus*.

In *U. S. v. Yung Ah Lung*, also involving a Chinese detained aboard ship by order of the Immigration Authorities, it was urged that the only restraint was that he was not permitted to enter the United States, and that therefore he was not entitled to a writ. The court held that the case was a proper one for the issuing of the writ.

In *U. S. ex rel. Alterie v. Flint*, a case substantially on all fours with that of Ludecke, it was held that an inductee, though transferred to enlisted reserve to allow time to arrange personal affairs before reporting at Reception Center is subject to the Articles of War and Army orders and hence, and though physically at large, is subject to sufficient restraint to support *habeas corpus*.

The respondent in the *Alterie* case had argued, as he likewise did in the *Jaegler* and *Lindenau* cases, that the relator

"is not actually confined and restrained of his liberty, and that the respondent is without power to produce the body in court."

In *re Foster*, 44 Texas Cr. 359, a lawyer held in contempt was in custody of the sheriff who released him on parole so he could file a *habeas corpus* to test the validity of his detention. It was held that such restraint was sufficient to justify issuance of the writ of *habeas corpus*.

Parole under conditions which prevail in petitioner Ludecke's case are distinctly different from parole granted pursuant to provisions of law upon expiration of sentence, or release on bail in criminal cases. Bail is fixed by a court. Parole of prisoners upon expiration of their sentence is granted by law. Parole in alien enemy cases is granted by respondent, and may be revoked at his whim at any time. Petitioner submits that this is an important distinction and defeats the argument of respondent that the case is moot.

To hold otherwise would permit respondent to capitalize on the present situation and make a travesty of this case. If the Court should sustain respondent's argument that Ludecke's release on parole made the case moot, Respondent could in every alien enemy case release the alien enemy as soon as he obtained a writ of *habeas corpus*, or a writ of certiorari from this Court, and then urge that the writ is moot. Immediately upon the dismissal of the proceeding respondent could then again take petitioner into custody. If the petitioner then again obtains a writ the respondent could once again release him on parole and thus prevent the alien enemy from ever obtaining a decision on the merits.

This Court having granted a writ is entitled to have the issues presented and argued on the merits. Petitioner suggests that respondent by raising the question of whether the case is moot is really seeking to avoid argument on the

merits by raising a technicality over which respondent has sole control, and which respondent was created.

It is true that the cases are numerous in which this Court has held that it will not decide questions which have become moot. But those decisions were based upon the principle that the court is not empowered to decide moot questions, or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. (*California v. San Pablo R.R. Co.*, 149 U. S. 308, 314.)

Petitioner respectfully urges that his release on temporary parole has not made his case moot; that his fate as well as that of more than 170 other alien enemies detained on Ellis Island subject to removal order is involved. Whether petitioner Ludecke is on temporary parole or in actual physical custody, the decision of this Court necessarily will go to the merits of his case which involves the fundamental question of whether respondent can remove a resident alien from the United States without trial or hearing and in denial of the requirement of due process of law. The issues raised in the *Ludecke* case affect his rights and the rights of more than 170 other persons and are so fundamental that by no stretch of the imagination can it be said that the case is moot, because respondent has temporarily released him on parole.

Once a case is before the Court, it must make such disposition of the case as justice requires.

Patterson v. Alabama, 294 U. S. 600, 607;

Dorothy v. Kansas, 264 U. S. 286, 289.

The issues in the *Ludecke* case are now before this Court. Justice requires that disposition be made on the merits, not evaded on a technicality.

Apart from the fact that the *Baker* case is absolutely and completely different from the *Ludecke* case, also the parole question per se is an entirely different one. The criminal convict *Baker* sentenced with due process of law was semi-free on parole and remained semi-free until the completion of his sentence, when automatically he regained his full freedom even though his certiorari was dismissed as moot; whereas this Petitioner, a law-abiding legally admitted bona fide alien resident, nevertheless a prisoner for already six years and five months, should his case be dismissed as moot, not only will return to prison within a very few days, namely, on May 3, but also face deportation to more misery, maybe even death, in a larger concentration camp that prostrate Germany is today, branded as a "dangerous" animal on top of it—and all this without due process of law. Or should he start all over again with a new writ of *habeas corpus* to reach this Court perhaps within another year's time should he still be alive or not gone crazy meanwhile? Would that solve the problem? Does that make sense to dismiss the case as moot today, only to face the same problem tomorrow? And what about the other internees still rotting at Ellis Island who depend upon the outcome of this case? Further, there is the *Laughlin* case that depends upon the instant case. How to dispose of it, if this one is dismissed as moot? Would that be today's practical interpretation and application of Equal Justice Under Law?

Considering the definite difference between the two cases of *Baker* and *Ludecke*, there must be made a clear distinction, because the end of a temporary parole means to the alien enemy the end of semi-liberty and the return to full imprisonment; whereas the end of a parole means usually to the convict the end of semi-liberty but at the same time return to complete liberty. If the *Ludecke* case is moot, then the *habeas corpus* case of any internee is moot who happens

to be on parole for whatever reason, illness, sudden death in the family, voluntary departure, and so on. Such a concept of law would lead to crazy situations. Here is one for illustration. Supposing Petitioner would have been at Ellis Island when his certiorari was granted; supposing further he would win his case in Court, then all those internees on parole would not be released because their cases had become moot, therefore would have to start individual litigations to also gain their freedom. But what if they could not act as attorneys in person and had no money left to pay the lawyers for new actions? Would that make sense and would that be Equal Justice Under Law?

There is another question involved which calls for an answer. Once the Court grants certiorari to an imprisoned petitioner who has the permission to proceed in *forma pauperis* and act as attorney in person, would it not be self-evident then as a matter of necessity to grant him also parole, so that he as a free agent may have the liberty to do all that he should do to protect the interests of his client who happens to be himself? Only one who like this Petitioner has fought his own case while in prison, knows what it means, how exasperating it is, how impossible it seems! And then, after all the work was done to be cheated of his labor, or so near the goal to see a Great Case in danger of being killed on the grounds of a fabricated technicality! Besides, was there ever a professional lawyer who was paid to fight a case for a client and execute his duties while he was imprisoned?

If the procedure without due process of law adopted by the Department of Justice in the instant case is a violation of established National Law as well as of recognized Natural Law, and indeed there is no doubt that it is, then it is inconceivable that this Honorable, the Supreme Court of the United States, after granting certiorari would dismiss

the case as moot in view of the *Baker v. Hunter* precedent because your Petitioner happened to be on parole for a few days—a situation forced upon him by a force majeure as explained above.

Moreover, Petitioner who is but an humble medium of a Higher Power must insist that it is not he but rather the Fundamental American Principle that here stands at the bar, *against* which or *for* which Providence has called upon this August Court to make a clear decision, which must and should not be dodged. For to dismiss this case as moot, at this very stage, would tend to make a travesty of Justice and jeopardize, nay, nullify the very purpose of the Habeas Corpus Act, a Sacred Right, so dear to the American people, so indispensable to Humanity at large.

In conclusion, summing up—it is inconceivable that the Court, first yielding to a higher impulse when finally granting certiorari in the instant case, after soaring up with wings of the American Eagle to the realm of Magnanimity and Justice suddenly flops to the ground into the mire of red tape, technicalities, and quibbling of subaltern and inferior minds—No, that cannot be, that must not be; Wherefore, Your Petitioner prays that “the question whether the case is moot” be disregarded and dismissed

Respectfully submitted,

KURT G. W. LUDECKE,

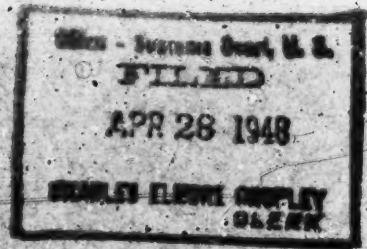
Petitioner,

Attorney in person.

Washington, D. C.

April 26, 1948

FILE COPY



No. 723

In the Supreme Court of the United States

OCTOBER TERM, 1947

KURT G. W. LUDECKE, PETITIONER

v.

**W. FRANK WATKINS, AS DISTRICT DIRECTOR OF
IMMIGRATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE RESPONDENT

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| 9 Works of John Adams (1854) 156-157..... | 16 |

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 723

KURT G. W. LUDECKE, PETITIONER

**W. FRANK WATKINS, AS DISTRICT DIRECTOR OF
IMMIGRATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the District Court for the Southern District of New York (R. 22-41) are not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 44-45) is reported at 163 F. 2d 143.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on July 24, 1947 (R. 45). The petition for a writ of certiorari was filed on October 21, 1947, and certiorari

was granted on April 5, 1948 (R. 46). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below properly held that it lacked power to review a removal order, issued by the Attorney General pursuant to the Alien Enemy Act and Presidential Proclamation 2655, against petitioner, an admitted alien enemy.
2. Whether the power so to remove petitioner has lapsed because of the cessation of hostilities between the United States and Germany.¹

STATUTE, PROCLAMATION, AND REGULATIONS INVOLVED

The provisions of the Alien Enemy Act of 1798, R. S. 4067-4070, as amended, 40 Stat. 531, 50 U. S. C. 21-24, are set out in Appendix A, *infra*, pp. 31-33. The text of Presidential Proclamation 2655 (10 F. R. 8947) and of the Attorney General's regulations issued pursuant to the latter Proclamation are set forth in Appendices B and C, respectively, *infra*, pp. 33-36, 36-38.

¹ The second question presented has been fully briefed and argued by the Government, and is presently pending before this Court for decision in *Paul Ahrens, et al. v. Clark*, No. 446, this Term. We do not discuss the question herein but respectfully refer the Court to our brief in the *Ahrens* case.

STATEMENT

This proceeding was instituted in the District Court for the Southern District of New York on October 14, 1946, by the filing of a petition for a writ of habeas corpus (R. 1-2). Petitioner, a German alien enemy, alleged that his detention at Ellis Island, New York, was illegal in that he was being held solely pursuant to a removal order issued by the Attorney General and not by virtue of any court order or decree (R. 1). Petitioner also challenged the validity of the administrative hearings which preceded the issuance of the removal order (R. 2). A writ of habeas corpus was issued on October 18, 1946 (R. 22). The return to the writ, filed on October 28, 1946, on behalf of respondent, District Director of the Immigration and Naturalization Service for the District of New York, showed that petitioner, born in Berlin, Germany, on February 5, 1890, was a German national, and was being held in custody as an alien enemy pursuant to the Alien Enemy Act of 1798 and Presidential Proclamations issued thereunder; and that he was subject to a removal order issued by the Attorney General on January 18, 1946 (R. 3). A copy of the removal order was annexed to the return (R. 3-4).

A hearing was held before the district court on October 29, 1946 (R. 36). By opinion dated

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November 6, 1946 (R. 22-35), the district judge rejected the Government's contention that the only question open for judicial consideration was the question of alien enemy status (R. 33). However, he went on to hold that petitioner had been accorded a full and fair hearing before the hearing boards, that the removal order was supported by substantial evidence, and that the order of the Attorney General was accordingly binding (R. 33-35). The writ was dismissed on November 6, 1946 (R. 35). A rehearing on December 26, 1946 (R. 36-41), granted by the district court, again resulted in dismissal of the writ of habeas corpus (R. 41).² In its opinion on rehearing, dated January 2, 1947, the district court noted the decision of the Second Circuit Court of Appeals on December 31, 1946, in *United States ex rel, Schlueter v. Watkins*, 158 F. 2d 853, in which the court below held that judicial scrutiny of removal orders of the type here involved was limited to the question of alien enemy status (R. 40-41). Upon appeal, the court below affirmed the dismissal of

² At the first district court hearing on October 29, 1946, petitioner declined the court's suggestion that he have the assistance of an attorney and elected to proceed *pro se* (R. 26, 36-37). At this hearing, the court received a long written statement by petitioner, together with attachments, and considered these papers as having " * * * the same force and effect as if he [petitioner] had testified to them * * *" (R. 33, 36). After the October 29, 1946, hearing, the district judge assigned counsel to advise petitioner and permitted the matter to be reopened for the purpose of hearing additional evidence presented by petitioner and counsel (R. 36-37).

the writ (R. 45), holding that it saw " * * * no reason for discussing the nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General for the reason that his order is not subject to judicial review * * * " (R. 44).

SUMMARY OF ARGUMENT

The words of the Alien Enemy Act make it clear that the power granted the President in Section 21 of that Act is an independent power not requiring the aid of the courts for its effectuation. Section 21 has been thus construed ever since the War of 1812, and the rationale of those decisions not only confirms the conclusion that the Executive may effectuate his removal orders without judicial intervention but also makes it clear that Executive orders of removal are not to be subjected to judicial scrutiny.

That Congress did not intend judicial intrusion into the Executive exercise of powers conferred by the Alien Enemy Act is made perfectly clear by the legislative history of the Act which reflects a Congressional impatience with anything which would delay the summary enforcement of the power conferred by the Act over alien enemies. The nature of governmental power over alien enemies and of the judgment which the Act requires of the Executive is such that it would be wholly inappropriate for the courts to review Executive determinations in this

field. The power of Government, over alien enemies is an aspect of the war power, and the judgment required of the Executive is a political judgment. Under these circumstances, the Constitution does not require that judicial review be supplied when it was withheld by Congress.

In delegating part of his authority to the Attorney General, the President did not create the right to a judicial review of the question whether the Attorney General was acting within the scope of the delegated authority. Nothing in the Proclamation granting the Attorney General his authority creates the right of judicial review, and to infer such a right would be wholly inconsistent with the nature of the program being administered. Certainly when Congress has withheld jurisdiction from the federal courts in cases of this sort, the President cannot confer it.

ARGUMENT

THE ATTORNEY GENERAL'S ORDER FOR THE REMOVAL OF PETITIONER, AN ADMITTED ALIEN ENEMY, IS NOT JUDICIALLY REVIEWABLE.²

On January 18, 1946, the Attorney General ordered that petitioner be removed from the United States. In the order, it was recited upon full hearing before the Alien Enemy Hear-

² Although respondent concedes that the question of alien enemy status is judicially reviewable, that question is not here involved, since petitioner, a German national, is admittedly an alien enemy.

ing Board on January 16, 1942, and the Reparation Hearing Board on December 17, 1945, petitioner was found to be an alien enemy deemed dangerous to the public health and safety of the United States. This removal order was issued pursuant to President Truman's Proclamation 2655 (Appendix B, *infra*, pp. 33-36), issued on July 14, 1945 (10 Fed. Reg. 8947), authorizing the Attorney General to order the removal from the United States of "all alien enemies now or hereafter interned within the continental limits of the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States." Proclamation 2655, in turn, was issued under the authority vested in the President by Section 21 of the Alien Enemy Act of July 6, 1798 (1 Stat. 577), Appendix A, *infra*, p. 31.

The essence of petitioner's attack on the issuance of the removal order here involved is a denial that the statutory power of the Executive, to intern and remove all alien enemies during "declared war", is plenary and not subject to judicial review or intervention (see, *e. g.*, Pet. 6-7, 8, 9-10, 14-15, 30, 31, 33). That his attack has no basis is clear, we submit, from the face of the

* By Proclamation 2526, dated December 8, 1941 (6 Fed. Reg. 6323), the President had authorized the Attorney General to intern German alien enemies. This proclamation was also issued pursuant to Section 21 of the Alien Enemy Act. Petitioner was interned under the proclamation by order dated December 8, 1941 (R. 26).

Alien Enemy Act of 1798, its legislative history and the judicial precedents involving its application to the effect that the power there granted to the President is plenary, and the orders issued by the Executive pursuant thereto, whether for the internment or removal of alien enemies, are not subject to judicial review, and do not require the intervention of the judiciary to make them enforceable.

A. *The Alien Enemy Act authorizes the President to remove alien enemies without the intervention of the courts.*—The Alien Enemy Act of 1798 clearly provides two alternative, and mutually exclusive, methods pursuant to which an alien enemy may be restrained or removed out of the territory of the United States during time of war. The first is set out in Section 21. See Appendix A, *infra*, p. 31). The President is there authorized to direct by proclamation the conduct to be observed, on the part of the United States, toward the aliens who become liable to be apprehended, restrained, secured and removed as alien enemies. He is further authorized to proclaim the manner and degree of the restraint to which these alien enemies shall be subject and in what cases, and to provide for their removal if they refuse or neglect voluntarily to depart.

The second independent method for dealing with alien enemies during wartime is provided in Section 23. See Appendix A, *infra*, pp. 32-33. By that Section, the several courts of the United States

having criminal jurisdiction, are authorized and required, upon complaint against an alien enemy, to hold a full examination and hearing to determine whether the alien enemy is dangerous to the public peace or safety, and if sufficient cause should appear, the court is authorized to order the alien enemy restrained or removed out of the territory of the United States.

That these are mutually exclusive procedures for the issuance and effectuation of removal orders is made clear by Section 24 of the Act (Appendix A, *infra*, p. 33) which treats Executive orders under Section 21 as of equal dignity, and on a parity, with comparable orders judicially issued under Section 23. Section 24 imposes an identical duty on the marshal of the district in which the alien enemy was apprehended to cause the removal of the alien whether that removal "is required by the President, or by order of any court, judge, or justice." It is "the warrant of the President, or of the court, judge, or justice" which is a prerequisite to action by the marshal.

Squarely supporting the conclusion which we believe to be compelled by the text of the Act, that Section 21, in and of itself, is sufficient for the effective exercise of the removal power,⁵ are the

⁵ The rule of construction laid down by this Court in *Martin v. Mott*, 12 Wheat. 19, 31-32, strengthens this conclusion. It was there held:

Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute con-

decisions in the *Lockington* cases, arising out of the War of 1812. What was said in those cases is relevant not only with respect to the view that the President has complete power under Section 21, and need not resort to the courts, but also to sustain the broader proposition discussed *infra*, pp. 15-29, that Executive action under Section 21 is not judicially reviewable.

Lockington was a British subject who had violated regulations issued under the Act during the War of 1812. War had been declared on June 18, 1812, but it was not until February 23, 1813, that an order was issued requiring alien enemies to retire to points more than forty miles from tide-water. After having voluntarily retired in compliance with the regulations, Lockington returned to Philadelphia and refused to depart therefrom. Upon being seized by the marshal for this disobedience, Lockington obtained a writ of habeas corpus from the Chief Justice of the Pennsylvania Supreme Court. In dismissing the writ, the Chief Justice gave short shrift to the contention that the President may act only through the courts. Chief Justice Tilghman there pointed out (*Lockington's Case*, Brightly (Pa.) 269, 280):

The president, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accord-

stitutes him the sole and exclusive judge of the existence of those facts.

ingly, we find that the powers vested in him are expressed in the most comprehensive terms. He is to make any regulations which he may think necessary for the public safety; so far as concerns the treatment of alien enemies. It is certain, that these powers create a most extensive influence, which is subject to great abuse; but that was a matter for the consideration of those who made the law, and must have no weight with the judge who expounds it. The truth is, that, among the many evils of war, it is not the least, to a people who wish to preserve their freedom, that, from necessity, the hands of the executive power must be made strong, or the safety of the nation will be endangered.

On January 1, 1814, the Pennsylvania Supreme Court, per the Chief Justice and two other Justices, denied Lockington's second petition for a writ of habeas corpus. *Id.* at 283, *et seq.* The concurring opinion of Yeates, J., indicates an understanding that Section 21 authorizes the removal of alien enemies out of the territory of the United States "without being under the necessity of recurring to the judicial authority for that purpose." *Id.* at 292. And Judge Brackenridge, in his opinion, characterized alien enemies as prisoners, much as prisoners of war, with respect to whom the "president would seem to be constituted * * * with the power of a Roman dictator or consul, in extraordinary cases, when the republic was in danger, that it sustain no damage; ne

quid detrimenti respublica capiat" (pp. 295-296). He referred (*id.* at 296) to a case, which Government counsel have been unable to discover, in the following terms:

A report has been read from a gazette, of a decision of a court of the United States, Chief Justice Marshall and Judge Tucker composing that court,—great names, and in high station. This report, if correct, carries with it evidence that the executive authority was warranted in apprehending, etc., without the intervention of the judicial power.

And he went on to state (*id.* at 297-298):

But I do not see that the courts of the United States have the power to interfere on any ground, on behalf of such description of persons. * * * The return of the marshal that he holds an applicant as an alien enemy * * *; and the admission by the applicant that he is of such description of persons; no traverse tendered as to his not being such, exclude, in my opinion, the interposition of this court, or of any other court.

Lockington thereafter was released on parole and, in April, 1814, sued the marshal, in a federal circuit court, for assault and battery and false imprisonment. *Lockington v. Smith*, 15 Fed. Cas. No. 8,448 (C. C. D. Pa.). Mr. Justice Washington (then a justice of the United States Supreme Court), although allowing on technical grounds a demurrer to the marshal's plea of justification,

made it clear that Lockington's attack on the enforcement of the Act was untenable, observing that the President's power under Section 21 of the Act "appears to me to be as unlimited as the legislature could make it" (p. 760). In dealing with the contention that the President could only enforce his regulations through the courts, he said (p. 761):

Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies; as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge. It was certainly proper, and, in many cases it might be highly beneficial to the public safety, to vest in the judiciary a power to enforce the ordinances of the president, in every case which should be regularly brought before it. But to bring this power into action, there must be a specific complaint against some particular individual, and a regular hearing of each case must be had. If no person will take upon himself the task of becoming an informer, at all times and under any circumstances an unpleasant one, is the public safety to be jeopardized, however imminent the president may know the danger to be? Certainly, this never could have been the intention of the legislature. If only judi-

cial interference can be resorted to, it is most obvious that the means are altogether inadequate to the end for which the law meant to provide. * * * Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter, the rule of its decisions.

Thus, it is plain that those who were nearest to the adoption of the Constitution and the enactment of the Alien Enemy Act were in accord that the power granted by that Act to the President to order the removal of alien enemies in time of war was ample for its effective enforcement and that the intervention of the courts was not required.* Accord: *Ex parte Graber*, 247

* In this connection, it may be noted that further evidence of contemporary Congressional understanding of the scope of the Presidential power under the Alien Enemy Act is contained in debates on alien enemy legislation in 1812 and 1813. By the Act of July 6, 1812, 2 Stat. 781, Section 22 (Appendix, *infra*, p. 32), concerning voluntary departure of alien enemies "not chargeable with actual hostility, or other crime against the public safety," was amended by providing that the treaties therein mentioned should not be deemed to mean treaties expiring before the issuance of the Presidential Proclamation. The Act of July 30, 1813, 3 Stat. 53, provided that residents of the United States who, before June 18, 1812, had declared their intention of becoming United States citi-

Fed. 882 (N. D. Ala.): *Minotto v. Bradley*, 252
Fed. 600 (N. D. Ill.).

Thousands of alien enemies have been restrained under this Act during the War of 1812, World War I and World War II without resort to the courts. We submit that the time has long passed since the propriety of this procedure could seriously be questioned.

B. Congress, in the Alien Enemy Act, contemplated no judicial review of executive orders of removal.—“Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied.” *Switchmen's Union v. Board*, 320 U. S. 297, 301. Section 21 of the Alien Enemy Act, under which the order here in question was issued, makes no

zens, might be admitted to citizenship notwithstanding they were alien enemies: “*Provided*, That nothing herein contained shall be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien.” In the Congressional debate preceding the passage of this Act, the need for mitigating the rigors of the naturalization law to permit the naturalization of alien enemies of the class mentioned above was emphasized by the statement that “they are subject and liable, according to a power vested in the President by an act passed in 1798, to be exiled from their homes, their families, and property, to any distant place designated by him within the limits of the United States, or at his pleasure may be ordered entirely out of the country.” 26 Annals of Congress, 13th Cong., 1st Sess., p. 466. (Italics supplied.)

provision for judicial review, and, indeed, its legislative history clearly shows that no judicial review was contemplated. The Alien Enemy Act was passed at a time when war with France was imminent (9 *Works of John Adams* (1854) 156-157), and the Congressional debates are striking in their reflection of a Congressional purpose to grant to the President a broad, summary power over alien enemies. Thus, Mr. Rutledge said (*Annals of Congress*, 5th Cong., 2d Sess., p. 1574) that:

In fact, in the situation of things in which we are now placed, the President should have the power of removing such intriguing agents and spies as are now spread all over the country. What, said Mr. R., would be the conduct of France, if in our situation? In twenty-four hours every man of this description would either be sent out of the country or put in jail, and such conduct was wise.

Mr. Otis' opinion (*id.* at 1576) was:

* * * that something ought to be done which should strike these people with terror; * * * he did not wish to give them an opportunity of executing any of their seditious and malignant purposes; he did not desire, in this season of danger, to *boggle* about slight forms, nor to pay respect to treaties already abrogated, but to seize these persons, wherever they could be found carrying on their vile purposes.

He further stated (*id.* at 1791):

It was necessary the President should have the power of judging in this case, and that punishment ought not to depend upon the slow operations of a trial.

Mr. Sitgreaves pointed out (*id.* at 1577) that:

All understand the right to which aliens are entitled by the laws of nations. They are no more than the rights of hospitality, and this right varies according to the relation in which the country from which they come, and that in which they reside, is peaceable, or otherwise.

We do not owe to the citizens of France residents in this country (since France had been mentioned) the same hospitalities which we owe to those foreigners who are alien friends; though he confessed there were rights of hospitality which could not be done away in time of war, particularly as it respects alien merchants, which were provided for in this resolution. And except a person had an actual agency in designs which would endanger the peace of the country, though he was ordered out of the country, a free passage would be given to himself and effects; and if actually engaged in designs against the country, there would be a strong necessity for restraining the liberty of any such persons.

And Mr. Sewall remarked (*id.* at p. 1790):

The intention of this bill is to give the President the power of judging what is fit in the way proposed by this bill. In proper to be done, and to limit his author-

many cases, it would be unnecessary to remove or restrict aliens of this description; and he believed it would be impossible for Congress to describe the cases in which aliens or citizens ought to be punished, or not; but the President would be able to determine this matter by his proclamation.

Statements such as these are wholly inconsistent with the view, asserted by the petitioner, that the Executive order of removal issued against him is reviewable by the courts. Evidencing as they ~~do~~ ^{these statements have} an obvious impatience with delay, ever since the *Lockington* cases, led the courts consistently to rule ~~these statements have~~ that the only question open to them was whether the subject of the restraining or removal order was in fact an alien enemy. That question out of the way, as it is here, the judicial function is at an end.¹

¹ *United States ex rel. Schlueter v. Watkins*, 158 F. 2d 853 (C. C. A. 2); *United States ex rel. De Cicco v. Longo*, 46 F. Supp. 170 (D. Conn.); *United States ex rel. Zdunic v. Uhl*, 46 F. Supp. 688 (S. D. N. Y.), reversed on another ground, 137 F. 2d 858 (C. C. A. 2); *Ex parte Gilroy*, 257 Fed. 110 (S. D. N. Y.); *Ex parte Risse*, 257 Fed. 102 (S. D. N. Y.); *Banning v. Penrose*, 255 Fed. 159, 160 (N. D. Ga.); *Ex parte Franklin*, 253 Fed. 984 (N. D. Miss.); cf. *United States ex rel. Kessler v. Watkins*, 163 F. 2d 140 (C. C. A. 2), certiorari denied, 332 U. S. 838; *De Lacey v. United States*, 249 Fed. 625, 628 (C. C. A. 9); *United States v. Tamm*, 247 Fed. 968, 971 (E. D. Wis.), affirmed *sub nom. Grahl v. United States*, 261 Fed. 487 (C. C. A. 7).

And see cases referred to *infra*, pp. 19-22.

The first decision of the district court in the instant case seems to be the only judicial expression of a divergent view. But the district court, faced with an expression of the rule

We have already adverted to the opinions of the distinguished judges of the same generation as the legislators who made up the Fifth Congress to the effect that the President was granted, by the Alien Enemy Act, the power to restrain and remove alien enemies "without the intervention of the judicial power." See *supra*, pp. 10-14. That view has survived the years.

In *Ex parte Graber*, 247 Fed. 882, 886 (N. D. Ala.), the court thus stated this established principle:

The court is of the opinion that such is the true construction of section 4067, R. S. U. S., and that the President, or the officers through whom he acted, is the exclusive judge of whether Graber was such an alien enemy as for the safety of the United States should be restrained as provided by law.

"It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities, which the Executive must be presumed to possess of public virtue and honest devotion to the

stated in the text by the Circuit Court of Appeals for the Second Circuit, did not repeat in its second opinion, its view that the finding of the Attorney General was, to some extent, reviewable. See *supra*, p. 4.

public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny." *Martin v. Mott*, * * * [12 Wheat. 19, 31].

In *Minotto v. Bradley*, 252 Fed. 600, 602, 603 (N. D. Ill.) which also involved the internment of an alien enemy during World War I, the district court, following the unanimous view of the earlier cases, refused to review the order interning petitioner:

* * * if, under a construction of the act of Congress, a person comes within the definition of an alien enemy, clearly it was within the power of Congress to deal with such alien as it saw fit; and if the law has prescribed how an alien enemy should be dealt with, either by executive proclamation or through the various administrative agencies of the government, the petitioner cannot complain. The sole question, as I see it, is: Is the petitioner an alien enemy, as defined by Congress? If the petitioner is not an alien enemy, the writ in this case must issue.

* * *

The determination by the President whether the facts justify the internment of the petitioner, provided he is an alien enemy, is not to be investigated by the courts. The courts, in the nature of things,

are precluded from discussing those facts. If the President were required to disclose the basis for his warrant, the entire purpose of the statute might be frustrated. The only question to be settled here is whether, under the construction of this statute, the petitioner is a "native, citizen, denizen or subject" of a power with which we are at war.

This view has been adhered to upon review in regard to World War II alien enemies by the various circuit courts of appeal which have considered the question. In *United States ex rel. Schwarzkopf v. Uhl*, 137 F. 2d 898, 900, the Circuit Court of Appeals for the Second Circuit held:

With the attorney general's finding that restraint of the appellant is required as a measure of public safety the courts have no concern. [Citations.] As these cases show, the relator's writ of habeas corpus can raise only the question whether he is an alien enemy within the statutory definition, that is, whether he is a "native, citizen, denizen or subject" of Germany.

In the *Citizens Protective League* case,* the Court of Appeals for the District of Columbia succinctly stated (155 F. 2d at 294):

Unreviewable power in the President to restrain, and to provide for the removal of, alien enemies in time of war is the essence

* *Citizens Protective League v. Clark*, 155 F. 2d 290, certiorari denied, 329 U. S. 787.

of the Act. * * * As a practical matter, it is inconceivable that before an alien enemy could be removed from the territory of this country in time of war, the President should be compelled to spread upon the public record in a judicial proceeding the method by which the Government may detect enemy activity within our borders and the sources of the information upon which it apprehends individual enemies. No constitutional principle is violated by the lodgment in the President of the power to remove alien enemies without resort or recourse to the courts.

And in various of the other cases in which this contention was made, it was summarily rejected by the courts as too well established to warrant discussion. See, *e. g.*, *United States ex rel. Hack v. Clark*, 159 F. 2d 552 (C. C. A. 7).^{*}

^{*} The English courts have held that under Section 18B of the Defence (General) Regulations, S. R. & O. 1939, No. 927, p. 715, as amended by S. R. & O. 1939, No. 978, and No. 1681, pp. 811, 815; and S. R. & O. 1940, Vol. II, No. 681, p. 24, No. 770, p. 30, and No. 942, p. 58, which confers on the Home Secretary the power to order imprisonment of any person, citizen or alien, believed dangerous to the public safety, the statement of the Home Secretary that he had reasonable cause to believe that the person concerned should be imprisoned, as evidenced by his signature to the imprisonment order, is sufficient answer to a petition for a writ of habeas corpus. *Liversidge v. Anderson* (1941), 3 All Eng. R. 338 (H. L. 1941). See also *Liversidge v. Anderson and Morrison* (1941), 3 All Eng. R. 612 (C. A. 1941); *Stuart v. Anderson and Morrison* (1941), 2 All Eng. R. 665 (K. B. 1941); *Rex v. Home Secretary, ex parte Greene* (1941), 3 All Eng. R. 104 (C. A.

The excerpt which we have quoted from the *Citizens Protective League* case goes beyond the question of what was contemplated by Congress to the problem of constitutional requirements in the premises. It is to that problem which we now turn, and, in the course of our discussion of it, we shall advert to the nature of the Executive determination under the Act, the type of decision that is required, and the constitutional source of the power that is being exercised. We believe that all of these factors are relevant in determining whether, despite no provision for it in the Act, "judicial review may be nonetheless supplied". *Switchmen's Union v. Board*, *supra*. We submit that in the light of these factors and of the legislative history set out above, judicial review is not available to the petitioner.

C. *Judicial review of executive orders of removal is not required by the Constitution.*—At the outset, it should be stated that we think it plain that persons ordered removed under this statute are constitutionally entitled to recourse to the courts for a judicial determination of whether or not they are alien enemies. Cf. *Ng Fung Ho v. White*, 259 U. S. 276, 282–285. In this case, petitioner's status as an alien enemy is conceded. But

1941); *Rex v. Home Secretary, ex parte Budd* (1941), 2 All Eng. R. 749 (K. B. 1941).

And the Canadian courts have similarly refused to review orders restraining enemy aliens. See *Re Beranek*, 24 Can. Cr. Cas. 252, 33 O. L. R. 139; *Re Guetiv*, 24 Can. Cr. Cas. 427.

to go further, and hold that an alien enemy is constitutionally entitled to judicial review of the Executive determination that he is of the class of alien enemies who should be removed would, we think, be patently anomalous, in the light of the nature of the power possessed by a sovereign at war over citizens or subjects of the enemy.

In our brief in the *Ahrens* case (No. 446, this Term, pp. 32-42), we have described at some length the nature of the relationship between the sovereign and an alien enemy. We demonstrated that the power over alien enemies was an attribute of the war power, that it was early referred to by Chief Justice Marshall as a "full right to take the persons * * * of the enemy wherever found", and that Mr. Gallatin, expressing a view in which he was joined by English and international law authorities, said that alien enemies "are liable to be treated as prisoners of war". The instrument which confers a power such as this is hardly one which would, at the same time, require judicial intrusion into its exercise. To find in the Constitution a right to judicial review of alien enemy orders of removal would be even more strange in the light of the well-recognized rule that recourse to the courts may be denied to alien enemies entirely "so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy." *Ex parte Kawato*, 317 U. S. 69, 75.

Moreover, the nature of the judgment committed to the President by the Alien Enemy Act is such that review by the courts would be inappropriate. *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 103, 111; *Hirabayashi v. United States*, 320 U. S. 81, 93. The judicial power conferred by Article III of the Constitution does not extend to a determination of political questions, a category which comprehends the executive determination here involved. *C. & S. Air Lines v. Waterman Corp.*, *supra*, and cases there cited. It is often the duty of the President to act on suspicion rather than proven fact, inasmuch as the purpose of the Act is preventative, not punitive, and is directed at eliminating the danger that alien enemies may attempt to harm or hinder the country in its efforts to wage war successfully.¹⁰ Such prevention is of peculiar importance when, as now, infiltration and fifth column activities are common methods of waging war. Hence, as the Lord Chancellor of England has said in a similar context (*Rex v. Halliday (Ex parte Zallin)*, (1917) A. C. 260, 269), "It seems obvious that no tribunal for

¹⁰ In *Case of Fries*, 3 Fed. Cas. No. 5126, Mr. Justice Iredell (then a Justice of this Court) pointed out, pp. 831-2: "In cases like this, it is ridiculous to talk of a crime, because perhaps the only crime that a man can then be charged with, is his being born in another country, and having a strong attachment to it. He is not punished for a crime that he has committed, but deprived of the power of committing one hereafter to which even a sense of patriotism may tempt a warm and misguided mind."

investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law." Cf. *Brown v. United States*, 8 Cranch 110, 128-129, *Re Guzetu*, 24 Can. Cr. Cas. 427.

Finally, if as we have shown (*supra*, pp. 15-18) the Fifth Congress contemplated no judicial review of Executive orders of removal, its "contemporary construction" of the Constitutional requirements in that respect is entitled to great respect. *Ex parte Quirin*, 317 U. S. 1, 41-42.

D. *Nothing in Presidential Proclamation 2655 justifies judicial review of the Attorney General's order of removal.*—A question has been raised as to whether the President, having the plenary power under Section 21 of the Alien Enemy Act to order the removal of all alien enemies, subjected the removal orders of the Attorney General to judicial scrutiny by authorizing him to order the removal from the United States of only those alien enemies "deemed * * * to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof." Proclamation 2655, Appendix B, *infra* p. 35. None of the various cases treating with internment or removal of alien enemies indicates that the existence of a delegation of only part of the Presidential power over alien enemies to one of his subordinates was considered in any way to affect the nonreview-

ability of the order. See, e. g., *Citizens Protective League v. Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787; *United States ex rel. Hack v. Clark*, 159 F. 2d 552 (C. C. A. 7); *Minotto v. Bradley*, 252 Fed. 600 (N. D. Ill.); *Ex parte Gruber*, 247 Fed. 882 (N. D. Ala.). This view, is, we believe, sound.

Nothing in the text of Proclamation 2655 suggests that judicial review is contemplated. And to infer that the courts are to supervise the Attorney General in his exercise of powers granted him by the President is to ignore the nature of the power and the clear Congressional purpose that the Executive branch of the Government was to be left free to act in its discretion. See *supra*, pp. 8-26. In none of the various Presidential Proclamations, relating to internment or removal of alien enemies during World War II which apply only to alien enemies deemed dangerous to the public health and safety of the United States,¹¹ is there any indication that the President, in thus delegating only part, rather than all, of the power vested in him by Section 21 of the Alien Enemy Act, intended thereby to subject the Attorney General's order to judicial review. On the contrary, all indicate clearly that the Attorney General's authority, like that of the President, is to be one of untrammelled

¹¹ Presidential Proclamation 2525, 6 F. R. 6321; Presidential Proclamation 2526, 6 F. R. 6323; Presidential Proclamation 2527, 6 F. R. 6324; and see Appendix B, *infra*, pp. 33-36.

discretion free from judicial scrutiny. Thus Proclamation 2526 (6 F. R. 6323) incorporating Proclamation 2525 (6 F. R. 6321) by reference, provides that dangerous alien enemies "are subject to summary apprehension." Such apprehension is to be made by "such duly authorized officer of the Department of Justice as the Attorney General may determine." The alien enemies so arrested are to be confined in such place of detention as may be directed by the officers responsible " * * * or in such other places of detention as may be directed from time to time by the Attorney General * * *." Similarly Proclamation 2655, Appendix B, *infra*, pp. 33-36, clothes the Attorney General with an unreviewable discretion by providing for the removal of those alien enemies "who shall be *deemed by the Attorney General* to be dangerous to the public peace and safety of the United States," the departures to conform "with such regulations as he [the Attorney General] may prescribe." [Italics supplied.] The Proclamation does not require the Attorney General to make a finding of dangerousness; it simply delegates to him the duty of judging. That judgment, if made by the President would not be reviewable; it does not become so because the Attorney General acts for the President. Should the President be dissatisfied with the manner in which the Attorney General is exercising the authority granted, he can withdraw the authority entirely or direct a reversal in a

particular case. But that is a problem of executive management, not of judicial supervision. Cf. *In re Yamashita*, 327 U. S. 1, 8. A delegation of authority to a subordinate executive officer cannot give rise to judicial review when it is not otherwise available. The contrary doctrine would lead to judicial intrusion into matters that are otherwise plainly nonjusticiable; the courts could then inquire into the actions of any executive subordinate exercising a delegated authority such as the disciplining of a minor federal employee.

A holding that the President, by vesting the Attorney General with authority over only a special category of alien enemies, *i. e.*, dangerous alien enemies, inadvertently made the Attorney General's orders reviewable by the courts would be in direct conflict with Article I, Section 8, Clause 9, and Article III, Section 1 of the Constitution, vesting in the Congress, not the President, the power to establish inferior courts and thereby determine their jurisdiction. Cf. *Lockerty v. Phillips*, 319 U. S. 182; *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156. Where Congress has withheld jurisdiction from the courts, as it has in cases arising out of Section 21 of the Alien Enemy Act (see *supra*, pp. 8-26), the President cannot confer it. Nor can the courts assume such jurisdiction where it has been withheld by Congress.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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APRIL 1948.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067-4070,
50 U. S. C. 21-24, provides:

§ 21. Restraint, regulation, and removal.

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens; denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety

¹ The section numbers used are those which appear in Title 50 of the United States Code.

(R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531).

§ 22. Time allowed to settle affairs and depart.

When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native, citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality (R. S. § 4068).

§ 23. Jurisdiction of United States courts and judges.

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be

removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed (R. S. § 4069).

§ 24. Duties of marshals.

When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be (R. S. § 4070).

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

PROCLAMATION 2655

REMOVAL OF ALIEN ENEMIES BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas section 4067 of the Revised Statutes of the United States (50 U. S. C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U. S. C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,

Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189) pursuant to Presidential Proclamation 2655:

Title 28—Judicial Administration

Chapter I—Department of Justice

Part 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U. S.

Sec.

30.71 Removal from the United States of alien enemies.

30.72 Order of the Attorney General.

30.73 Service of removal order on alien enemy.

30.74 Thirty-day period for voluntary departure.

30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U. S. C. 21.

§ 30.71 *Removal from the United States of alien enemies.* The Proclamation of the President of the United States, No. 2655

(10 F. R. 8947), dated July 14, 1945, provides in part:

All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe.

§ 30.72 *Order of the Attorney General.* When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principle of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen or subject.

§ 30.73 *Service of removal order on alien enemy.* A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74 *Thirty-day period for voluntary departure.* An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of

the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.* In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

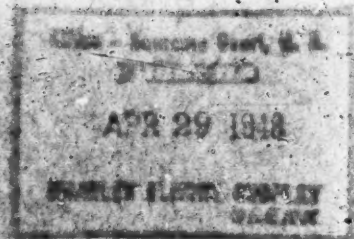
Approved: September 26, 1945.

TOM C. CLARK,
Attorney General.

(F. R. Doc. 45-18005; Filed Sept. 27, 1945:
10:11 a. m.)



FILE COPY



No. 723

In the Supreme Court of the United States

OCTOBER TERM, 1947

KURT G. W. LUDDOKE, PETITIONER

v.

**W. FRANK WATKINS, AS DISTRICT DIRECTOR OF
IMMIGRATION**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**MEMORANDUM FOR THE RESPONDENT WITH
RESPECT TO MOOTNESS**

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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 723

KURT G. W. LUDECKE, PETITIONER

v.

**W. FRANK WATKINS, AS DISTRICT DIRECTOR OF
IMMIGRATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

MEMORANDUM FOR THE RESPONDENT WITH RESPECT TO MOOTNESS

This Court has directed both parties to discuss the question of whether this case is moot. Sup. Ct. Journal, April 19, 1948, p. 220. That issue arises out of the following circumstances:

Petitioner's application for a writ of certiorari was originally denied on January 12, 1948. Sup. Ct. Journal, Jan. 12, 1948, p. 122. A petition for rehearing was filed on January 27, 1948, and, on February 2, 1948, this Court entered an order staying the removal of petitioner. Sup. Ct. Journal, Feb. 2, 1948, p. 136. Thereafter, petitioner filed a motion seeking action on his petition for

rehearing which was denied on March 8, 1948. Sup. Ct. Journal, March 8, 1948, p. 167.

The next day, March 9, 1948, he filed a new application for a writ of Habeas corpus in the United States District Court for the Southern District of New York, urging primarily that he be given a parole in order to enable him to effect a voluntary departure. The writ, which had issued on March 19, 1948, was dismissed on March 25, 1948, and, on March 30, 1948, petitioner filed a petition for rehearing and for a stay of removal, expressing the view that the stay granted by the Supreme Court might lapse with a decision in the *Ahrens* case, No. 446, this Term, while petitioner's proceedings in the district court were still pending.

On March 26, 1948, the petitioner wrote a letter to the Chief of the Alien Parole Section requesting a parole in order to enable him to arrange for his voluntary departure, stating in the letter that he should definitely prefer to stay in America but that voluntary departure was the only alternative left to him if the authorities insisted upon his leaving the United States.

On March 31, 1948, petitioner was granted a parole pursuant to an agreement in which he stated that he understood he was granted a 30-day parole for the express purpose of effecting his departure from the United States, and that if he could not produce a visa or evidence that it could be obtained, he would surrender to Ellis

Island on May 3, 1948, for immediate involuntary removal to Germany. He further agreed that he would report to an immigration inspector on Ellis Island by telephone once a week,¹ that he would withdraw his application for rehearing to the Southern District of New York and that habeas corpus proceedings would be discontinued. A copy of the agreement is set forth in the Appendix, *infra*, p. 11.

On March 31, 1948, the petitioner wrote a letter to the district judge withdrawing his petition for rehearing, explaining that he had been paroled. Before he received the letter on April 1, 1948, the district judge had, however, on March 31, 1948, denied the petition for rehearing and the application for a stay of removal.

On April 5, 1948, this Court granted petitioner's application for rehearing, vacated its order denying certiorari, and granted certiorari (R. 46). The question to which this memorandum is addressed is whether, in view of the circumstances described above, this Court can proceed to a decision of this cause on its merits.

We start with the well-established principle that habeas corpus is a judicial inquiry into the cause of restraint of liberty and that "there is no warrant in either the statute or the writ for its use to invoke judicial determination of questions

¹ This requirement has since been modified to permit the petitioner to report to the Washington, D. C., field office of the Immigration and Naturalization Service.

which could not affect the lawfulness of the custody and detention." *McNelly v. Hill*, 288 U. S. 131, 137; *Eagles v. Samuda*, 329 U. S. 304, 307. Furthermore, this Court has held that the restraint must be physical, and not merely a moral restraint. Thus, where a military officer was ordered to confine himself to the city of Washington pending trial by court-martial, this Court held that he was not under such restraint as would entitle him to obtain a writ of habeas corpus. *Wales v. Whitney*, 114 U. S. 564, 572-574. So also, a person at large on recognizance, except where he is released by virtue of seeking the writ itself, is deemed not to be in custody and therefore not in a position to apply for a writ of habeas corpus. *Johnson v. Hoy*, 227 U. S. 245; *Stallings v. Splain*, 253 U. S. 339, 342. And a prisoner who has been conditionally released or paroled, and who while on parole is technically "in the legal custody and under the control of the warden" (18 U. S. C. 716) is nevertheless deemed not to be in such custody as would justify issuance of the writ of habeas corpus; *Baker v. Hunter*, 323 U. S. 740; *Weber v. Squier*, 315 U. S. 810.

On the other hand, the restraint of liberty which will support a petition for a writ of habeas corpus need not be actual confinement behind bars. Thus, a person unlawfully inducted into military service may bring habeas corpus to secure his release from military custody, although the restraint on his liberty is merely that imposed against all

soldiers subject to military orders. *United States ex rel. Steinberg v. Graham*, 57 F. Supp. 938 (E. D. Ark.); see *Eagles v. Somuels*, 329 U. S. 304.* It has been held that even where a selective service inductee was transferred to the Enlisted Reserve and allowed to go home for fourteen days to settle his affairs, he was nevertheless sufficiently restrained of his liberty to justify the bringing of a writ of habeas corpus, since in that interval he was still subject to military orders. *United States ex rel. Altieri v. Flint*, 54 F. Supp. 889 (D. Conn.), affirmed, 142 F. 2d 62 (C. C. A. 2). On the basis of this decision, one district court has held, in an unreported case, that an alien enemy granted a parole similar to that given to petitioner here was nevertheless in a position to bring habeas corpus to challenge the validity of the order of removal issued against him. *United States ex rel. Hubert Jaegeler v. Carusi*, decided June 16, 1947 (E. D. Pa.).†

If the petitioner had been on parole at the time he originally filed his application for habeas

* This situation is distinguishable from that presented in *Wales v. Whitney*, 114 U. S. 504, since there petitioner was not seeking to be released from the ordinary military restraints that flowed from his position as a naval officer, but only from the additional restraint arising from the order directing him to confine himself to the city of Washington.

† Compare the unreported decision in *United States ex rel. Lindenau v. Watkins*, decided January 21, 1947 (S. D. N. Y.), holding, on the basis of the *Altieri* decision, that an alien on parole under the immigration laws until he was wanted for deportation could bring habeas corpus.

corpus, the Court would be faced with the problem of deciding whether the *Altieri* decision was consistent with such of this Court's rulings as *Wales v. Whitney*, and, if so, whether alien enemy parolees are in a custodial status more akin to that of selective service inductees or to that of the officer involved in *Wales v. Whitney*. Among the factors to be considered would be the following: (1) The petitioner's present parole is required neither by the statute nor the regulations; he had previously been granted a parole, ending on June 25, 1946, pursuant to Section 22 of the Act, and Section 30.74 of the Regulations. See Appendices A and C of our main brief, pp. 32, 37-38. Since his present parole was, in a sense, an act of grace, it is possible that it could be revoked at any time and for any reason. (2) Petitioner now takes the position that his agreement to attempt voluntarily to depart is no longer binding. Hence revocation of parole by the Government might be justified on this ground. (3) Petitioner has not been prejudiced in any way by acting pursuant to the parole agreement. Although he withdrew his petition for rehearing in the district court, that court had already denied that petition. See *supra*, p. 3. Moreover, the time for an appeal to the Circuit Court of Appeals has not yet expired. Rule 73, Rules of Civil Procedure, as amended, 329 U. S. 866. (4) There is some question as to whether petitioner could lawfully bind himself, as he sought to do in the

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parolee's agreement, to dismiss his habeas corpus proceedings and, indeed, to submit to "involuntary removal" if he should fail in his efforts to remove himself voluntarily. Cf. *United States v. Andrews*, 240 U. S. 90.* Thus, the agreement may, in any event be unenforceable and therefore not binding on either of the parties to it. (5) Petitioner might possibly have arranged for a voluntary departure and that would certainly moot the case; on the other hand, if he fails to make such arrangements, he must return to Ellis Island on May 3, 1948, and make weekly reports in the meantime. Unless and until he leaves the country, he is subject to supervisory control and an imminent return to complete custody. (6) Petitioner's agreement to attempt voluntarily to depart was made only because it seemed to be the only alternative to involuntary removal. He would prefer to remain in the United States.

The weight to be accorded these various factors is not wholly clear. We do not attempt to resolve this difficulty because we think that, in the present circumstances, the problem may more readily be disposed of on other grounds. It is not necessary to decide whether petitioner could, originally, have filed an application for habeas corpus had he been on parole. The question is whether this Court can exercise an appellate jurisdiction to

*It is, of course, clear that the petitioner cannot be removed while this Court's stay order is in effect. See *supra*, p. 1.

review the action taken by the courts below when petitioner was actually in custody.

✓ If by May 3, 1948, petitioner has not made arrangements for his voluntary departure from the United States—and he has indicated that since the grant of certiorari by this Court he has made no attempt to make such arrangements—he will, after May 3, be back in the very same custody under the very same order which he initially attacked. ✓ After May 3, therefore, an opinion by this Court in this proceeding will determine the propriety of the exercise of judicial power by the lower courts in this case on the very same issue which was before those courts, and the judgment of this Court will affect the litigants in the case before it. ✓ After May 3, the judgment of this Court can be just as effective on the very issue presented by this case, as if the 30-day parole had never been granted. Practically, therefore, the situation is no different than would have been presented if petitioner had been granted release by a court pending his appeal, a circumstance which would not render the proceeding moot. *Eagles v. Samuels*, 329 U. S. 304, 308-309. Hence, we think that the parole here has resulted, at most, in a suspension of the power of this Court to act for the period of parole, rather than in a complete destruction of the cause of action, and that this Court may properly determine the issues before it if petitioner is actually in custody at the time that this Court acts in the cause.

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The suspension of a right to appellate review, and the restoration of that right when the conditions causing the suspension are terminated, is not an unknown situation. Thus, where a prisoner escapes pending appeal, this Court has refused to hear his cause, partly on considerations of policy, and partly because, while the prisoner is an escapee, a judgment by the court would be ineffective. *Smith v. United States*, 94 U. S. 97; *Beggs v. Nebraska*, 125 U. S. 692. Nevertheless, in these same decisions, this Court indicated that if the petitioner later brought himself under the control of the court, his case would be restored to the docket. See also *Wagner v. United States*, No. 749, this Term, decided April 19, 1948—where this Court ordered an appeal reinstated although appellant had been a fugitive for a number of years. We think that even if petitioner could not have brought habeas corpus while he was out on parole any more than an escaped defendant could be tried, his case may nevertheless be determined by an appellate court, so long as the controversy is not moot—as it is not in this case—and so long as, at the time the court is called upon to act, petitioner is in a position where the order of this Court can be effective.*

* An alternative device possibly available would be the issuance of an original writ of habeas corpus by this Court in aid of its appellate jurisdiction after the petitioner's return to Ellis Island.

The Government will undertake promptly to notify this Court of the petitioner's return to Ellis Island.

Respectfully submitted.

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Solicitor General.

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SAMUEL D. SLADE,
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Attorneys.

APRIL 1948.

APPENDIX

MARCH 31, 1948.

PAROLEE'S AGREEMENT

I, Kurt George Wilhelm Ludecke, a national of Germany, in consideration of my parole under regulations relating to alien enemies, hereby agree to keep in close touch with Inspector Joseph Judge, Immigration and Naturalization Service, Ellis Island, New York, and to that end I agree to report to him by 'phone on Thursdays during this period between the hours of 9:30 a. m. and 4 p. m. (Whitehall 38877, Ext. 85). I also agree to comply with all provisions of the regulations pertaining to alien enemies and with all the terms of my parole.

I understand that I am being granted a 30-day parole for the express purpose of effecting my departure from the United States under the outstanding removal order issued by the Attorney General, in my case. I agree that if I cannot produce a visa or evidence that it can be obtained and depart from the United States on or before May 1, 1948 under the outstanding removal order, as stated in my letter of March 26, 1948, I will surrender to Ellis Island not later than the 3:45 p. m. ferry on Monday, May 3, 1948 for immediate involuntary removal to Germany.

(Sg.) KURT LUDECKE.

P. S. I further agree that the appeal for a rehearing submitted on March 30, 1948, to the Southern District of New York, will be withdrawn and habeas corpus proceedings discontinued.

(Sg.) KURT LUDECKE.

(11)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 723.

KURT G. W. LUDECKE,

Petitioner,

vs.

W. FRANK WATKINS, Etc.,

Respondent.

BRIEF OF GEORGE C. DIX AND DAVID S. KUMBLE, ATTORNEYS FOR TWENTYTWO ENEMY ALIENS NOW DETAINED ON BELLE ISLAND, UNDER REMOVAL ORDERS IDENTICAL WITH THAT OF PETITIONER, AS AMICI CURIAE IN SUPPORT OF PETITIONER'S BRIEF.

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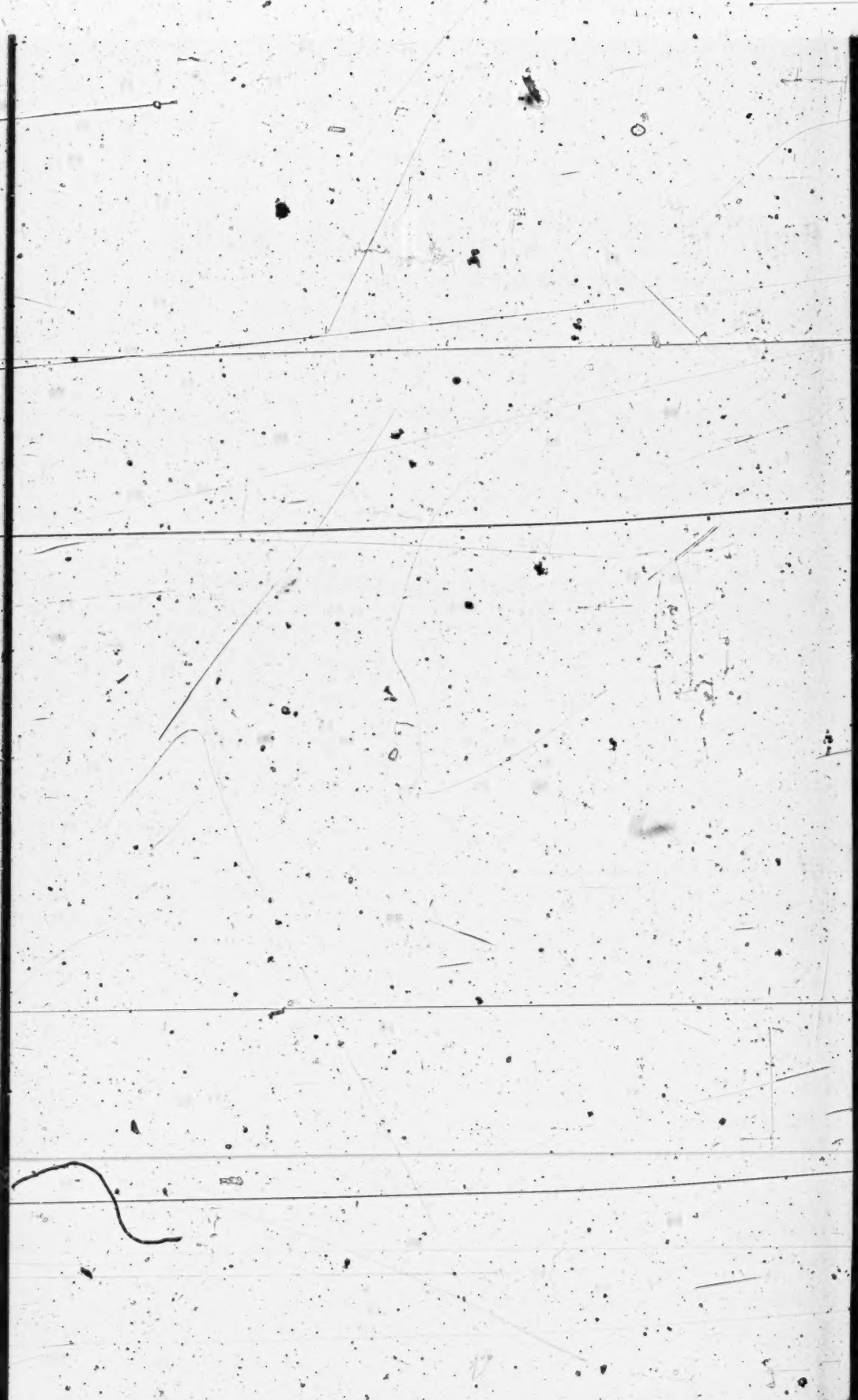
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

No. 723.

KURT G. W. LUDECKE,

Petitioner,

vs.

W. FRANK WATKINS, Etc.,

Respondent.

BRIEF OF GEORGE C. DIX AND DAVID S. KUMBLE, ATTORNEYS FOR TWENTY-TWO ENEMY ALIENS NOW DETAINED ON ELLIS ISLAND, UNDER REMOVAL ORDERS IDENTICAL WITH THAT OF PETITIONER, AS AMICI CURIAE, IN SUPPORT OF PETITIONER'S BRIEF.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 163 Fed. 2d 143. Other opinions involving the issues raised in this case are reported in 163 Fed. 2d 140, in 158 Fed. 2d 853, and in 67 Fed. Supp. 456.

Jurisdiction.

The jurisdiction of this Court rests upon Section 240 (a) of the judicial code as amended by Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347).

Questions Presented.

1. Do Sections 4067-4070 of the Revised Statutes (21 to 24 of Title 50 U. S. C.) correctly set forth the Alien Enemy Act as originally adopted by Congress.

2. Does the declaration of war by or against his country of origin automatically suspend or annul a legally resident alien's right to due process of law.

3. Was the petitioner an enemy alien at the time of the issuance of the removal order in view of the unconditional surrender of Germany, and the assumption of supreme and complete authority by the Allied Control Council.

4. Do removal orders issued without trial or fair hearing constitute a violation of the constitutional prohibition against bills of attainder.

5. Are these removal orders in violation of the terms of International Treaties to which the United States is a party.

Prefatory Statement.

The undersigned represent 22 persons alien enemies now detained on Ellis Island under removal orders identical with that in the case of petitioner Ludecke. All are legal residents of the United States. Six of them were naturalized citizens of the United States who were denaturalized during the war, four by default judgments, one by a consent judgment, and one after trial whose assigned counsel failed to appeal. Some of our clients are the fathers of native-born citizens, and are husbands of native-born and naturalized citizen wives. All our clients arrived in the United States as quota immigrants and have been continuously resident and domiciled here since, some as long as 25 years. A writ on behalf of our clients is pending undetermined before the United States District Court for the Southern District of New York, the hearing thereon having been completed on February 19, 1948.

Treaties and Statutes Involved.

The Alien Enemy Act of July 6, 1798. Treaty of Friendship with Germany dated October 14, 1925. Extradition Treaty with Germany signed July 12, 1930. Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro, September 2, 1947. Geneva Convention of 1929, and Hague Conventions.

Summary of Argument.

The central issues in this appeal are matters of substantive justice and law—not of mere technicalities of law—or, quite simply, of due process as to the removal from the United States of the relators as ordered by the Attorney General and upheld by the lower courts. The Attorney General's removal order has, as its main authority, the Presidential proclamation of July 14, 1945. This proclamation authorized the Attorney General to order the removal of such interned alien enemies as he may deem to be "dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof."

The fatal weakness of this Presidential proclamation and of the pursuant action by the Attorney General in these cases is the failure to provide for a hearing and for procedure calculated to insure a fair and reasonably accurate determination of the facts in each case. This weakness is not technical. It is fundamental. It is not so much a matter of protecting the rights of certain alien relators as it is of safeguarding for the future the public interest of the American people in being secure against arbitrary, capricious and abusive uses of power by the Executive branch in respect to such a crucial function as that of declaring what are the facts on which an exercise of the Executive power is based.

If any function of the courts is well established and definite, it is that of insuring protection to all under their jurisdiction against exercises of power by government agencies which are unwarranted by law and the facts. In declaring what is the law and what are the facts every government agency or official is limited in ways which it would seem superfluous to expound to this Court. Any finding of fact or declaration of facts to be made the basis of an exercise of the power of the state must measure up to certain standards. No government official has the right to proceed on the theory that the facts are whatever he may choose to say they are and that any finding of fact he may announce can be arrived at in any way he may see fit and cannot be challenged. It is of the essence of due process or the rule of law that findings of fact shall be arrived at in accordance with certain rules. An official cannot flip a coin to decide whether he will hold an alien enemy to be dangerous to the public peace and safety of the United States. Nor can he take the position that how he arrives at this conclusion in a given case is nobody's business but his own.

In time of war it is only natural and inevitable that any state should exercise the power to protect itself against alien enemies, actual and potential. During a war emergency it is natural that government agencies or officials charged with the protection of the state against foreign foes should not be required to prove affirmatively a case against an alien of enemy origin in order to be able to intern him in what the English call preventive custody. In such a period the state may be indulged the right to presume that any one of enemy origin is a potential enemy who should be interned or held in preventive custody. As will be pointed out, farther on, the British, in the late war, showed by their handling of this problem that it is in the public interest of a nation at war to afford generous facilities for enemy aliens under its control to show that they are not likely to prove dangerous and that they ought to be accorded a status and treatment in keeping with

their general attitude at the time, rather than with their technical status and the presumptions which would normally flow from it.

In wartime the only proof the state needs to intern an alien enemy is a birth certificate, or passport attesting the enemy origin and citizenship of the person in question. If the alien is not prepared to submit evidence to rebut such proofs of enemy nationality, it may be conceded that the interning state has made out a sufficient case for internment.

But, even for the duration of the state of war, it is most interesting for the purposes of this appeal to note that during the recent war the British government found it expedient, as a matter of national interest, to proceed somewhat judicially to determine just what alien enemies should and should not be interned. According to a well documented article by Dr. Robert M. W. Kempner in the American Journal of International Law of July 1940, the British set up no less than 112 tribunals, each presided over by a King's counselor, to hear the case of each one of no fewer than 74,233 alien enemies domiciled or temporarily in England at the outbreak of the war.

As these hearings went on in England during the latter part of 1939 and the first half of 1940, while the island was suffering almost daily bombings by enemy planes and while it was actually carrying out an evacuation of troops from the Continent, it is to be assumed that the British did not go to all this trouble out of maudlin sentiment for the enemy and for persons of enemy origin and nationality. It is to be assumed that they did it only for reasons grounded in the cold logic of national self-interest.

The point of citing this British wartime precedent of giving hearings to determine whether the facts of each case justified internment, conditional liberty or unrestricted freedom for alien enemies in time of war is merely to rebut the reasoning that there is anything in this appeal brief calculated to limit the power of the

state to protect itself against dangerous aliens. To ask that the state act on a finding of this nature only after it has observed certain universally recognized procedural formalities for fact-finding, is both to argue for due process and the most obvious requisites of sound public policy. The Court is being asked in this case to safeguard the public interest quite as much as any rights these aliens may have in the premises.

The public interest in this matter is far more important than any rights these aliens may have. The public interest requires that fact-finding by the Executive in any action involving the rights or interests of persons under the court's jurisdiction be made only in accordance with certain minimum formalities, one of which is a hearing at which the person adversely affected by the administrative finding of fact and challenging its accuracy is given opportunity to rebut any evidence on which the finding is based and to present evidence controverting it.

These aliens have never had a fair opportunity to oppose their threatened removal. They do not know the evidentiary bases of the removal orders, if any. The charges against them were never disclosed. They were never confronted by any witness. They were denied the right to counsel.

A person challenging an order of internment in wartime on the ground he was an alien enemy, if he denied the nationality imputed to him, would naturally submit with his challenge some evidence supporting his claim to a different nationality. But a person challenging the statement that he is removable because he is dangerous to the public peace and safety of the United States because of his national origin cannot be expected to tender evidence in support of his challenge as long as the challenged statement has never been supported by any evidence made public or available to him. The burden of proof is on the affirmative. Some negatives are not susceptible of proof. The theory of the government, upheld by the decisions of the lower Courts, is that the Attorney

7
General can, at his discretion, make the affirmative declaration that it is a fact that any aliens of enemy nationality in this country he may choose to name are dangerous to the public safety of this nation and that he does not have to offer or be in possession of any proof or any evidence in support of that affirmative.

The aliens challenge this theory. They base their challenge both on points of law hereinafter developed and on the far bigger and broader concept of the public interest which they respectfully urge upon the Court. If these removal orders are sustained by this Court of last resort, a sinister precedent would be established. If an Attorney General can make his finding of fact an incontestable basis for a removal action against an alien, without having made such a finding in accordance with well established rules, one of which is the formality of a hearing, why cannot a future Attorney General make a finding of fact about a native born citizen, similarly arrived at, the basis of some punitive or restrictive action against such a citizen which the Attorney General may be authorized to take, as, for example, in connection with the loyalty tests?

The essence of the difference between our political system and that of Soviet Russia is that civil rights cannot be impaired here by findings of fact and rulings of law except in accordance with certain procedure. In Russia an appropriate agency or official of the state can declare any alien dangerous, as the Attorney General has done in these cases, or any citizen subversive, disloyal or something else bad and can make that finding of fact, not arrived at by due process, the basis of almost any kind of punitive, repressive or other adverse action by the state. In Russia, the state does not have to prove a charge against or a characterization of an individual. The state has only to make it. These cases are an entering wedge for this sort of practise by our State. If the state can make a label stick merely by having the Attorney General apply it to an individual,

a new precedent in American jurisprudence and civil rights enforcement will have been established: The fact that, in the present instance, the victim of the Executive labelling without a hearing or privilege of rebuttal happens to be a person of foreign birth and of the nationality of our late enemies, the Germans, is relatively unimportant. Every one living under the jurisdiction of our courts and laws is supposed to enjoy their fullest protection. In this respect, the native born citizen is no better off in point of law than the alien. If the Attorney General can make a fact finding label, arrived at without a hearing and opportunity for rebuttal, stick as against an alien enemy under the jurisdiction of our courts, he can make a similar label, similarly arrived at, stick as against any native born citizen, given a requisite combination of circumstances.

ARGUMENT.

I.

Sections 4067-4070 of the Revised Statutes under which the respondent is proceeding are not the law. The words "resident within the United States", and other words vitally material to Relators' cases have been improperly omitted.

Respondent seeks to justify petitioner's detention by Sections 4067-4070 of the Revised Statutes (50 U. S. C., Sections 21-24). Comparison of these sections with the Alien Enemy Act (1 Stat. 577) as originally adopted by Congress on July 6, 1798 shows that certain words have been omitted which are vitally material to Relators' rights. Research shows that these omissions were not authorized by Congress, and that they are contrary to the intent of Congress as expressed at the time the Revised Statutes were adopted.

The omitted words are: "Provided * * * resident within the United States" (omitted from Section 22), and "alien or * * * as aforesaid, who shall be" (omitted from Section 23).

The Alien Enemy Act as originally adopted by Congress on July 6, 1798 reads:

"CHAP. LXVI.—AN ACT RESPECTING ALIEN ENEMIES

"SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President of the United States shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized, in any event, as aforesaid, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises

and for the public safety: *Provided, that* aliens resident within the United States, who shall become liable as enemies, in the manner aforesaid, and who shall not be chargeable with actual hostility, or other crime against the public safety, shall be allowed, for the recovery, disposal, and removal of their goods and effects, and for their departure, the full time which is, or shall be stipulated by any treaty, where any shall have been between the United States, and the hostile nation or government, of which they shall be natives, citizens, denizens or subjects: and where no such treaty shall have existed, the President of the United States may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

"Section 2. And be it further enacted, That after any proclamation shall be made as aforesaid, it shall be the duty of the several courts of the United States, and of each state, having criminal jurisdiction, and of the several judges and justices of the courts of the United States, and they shall be, and are hereby respectively, authorized upon complaint, against any alien or alien enemies, as aforesaid, who shall be resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President of the United States shall and may establish in the premises, to cause such alien or aliens to be duly apprehended and convened before such court, judge or justice; and after a full examination and hearing on such complaint, and sufficient cause therefor appearing, shall and may order such alien or aliens to be removed out of the territory of the United States, or to give sureties of their good behaviour, or to be otherwise restrained, conformably to the proclamation or regula-

tions which shall and may be established as aforesaid, and may imprison, or otherwise secure such alien or aliens, until the order which shall and may be made, as aforesaid, shall be performed.

"SECTION 3. And be it further enacted, That it shall be the duty of the marshal of the District in which any alien enemy shall be apprehended, who by the President of the United States, or by order of any court, judge or justice, *as aforesaid*, shall be required to depart, and to be removed, as aforesaid, to provide therefor, and to execute such order, by himself or his deputy, or other discreet person or persons to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President of the United States, or of the court, judge or justice ordering the same, as the case may be.

"Approved, July 6, 1798."

The italics indicate the words which have been omitted in the Revised Statutes. Some of the omissions were authorized, but the most important in so far as they relate to Relators' rights were not authorized. The words "being males" and "and of each state" were omitted by act of Congress. "Being males" was omitted by the Act of April 16, 1918 (40 Stat. 531), and "and of each state" by amendment at the time the Revised Statutes were under discussion in Congress early in the year 1874 (Congressional Record, Jan. 1874, p. 1417).

Reading the Alien Enemy Act as a whole it is clear that the proviso in Section I was intended to and did take the special cases or class of cases of all resident aliens and resident alien enemies out of the operation of the body of the section in which it is found. It has repeatedly been held that a proviso is intended to except

something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation.

McDonald v. U. S., 279 U. S. 12, 20;
U. S. v. McIlvain, 272 U. S. 633, 635.

Generally a thing that is excepted from the operation of a statute must necessarily belong to the class of things from which it is excepted.

Pott v. Arthur, 104 U. S. 735.

Can there be any doubt that when read as a whole, as any law must be, the Alien Enemy Act applied to all alien enemies; and that the proviso in Section 1 was put in for the purpose of setting apart for special consideration, and granting greater rights to those alien enemies who were "resident within the United States". Certainly Congress used those words and inserted them in a proviso in order to make sure that those aliens and alien enemies who might become subject to the Act would be treated in a manner different from non-residents. Again in Section 2 of the Act Congress in using the words "as aforesaid", certainly had reference to the previous section in which it had singled out alien enemies resident in the United States. This is all the more apparent on reading Section 2 making it the duty of courts having criminal jurisdiction to cause "any alien or alien enemies, as aforesaid, who shall be resident and at large . . . to be duly apprehended". Again we find a distinction made between alien enemies who are non-residents, and alien enemies who are residents.

In Section 3 the use of the words "as aforesaid" again shows that Congress had in mind the distinction made in Section 1 by the proviso at the end of that section. It clearly shows that Congress had in mind the rights of persons who had abandoned their original domiciles and established permanent residence in the United States,

thus entitling them to enjoy the benefits of all other residents.

It is to be noted that Congress definitely provided for due process of law in the case of alien enemies resident within the United States, because in Section 2 provision is made for "a full examination and hearing".

We are aware that Judge Rifkind in the *Schlueter* case (67 F. Supp. 526), held that an alien enemy is not entitled to due process, and has no rights other than those which the sovereign chooses to grant, that he may not complain about an unfair hearing, because he is not entitled to any hearing at all. We insist that the right to a full examination and hearing was granted to resident alien enemies in the Alien Enemy Act, and that having been so granted such rights the petitioner is entitled to object when they are denied to him.

The Revised Statutes Improperly Omitted Words Vitally Material to Relators' Rights.

By the Act of June 27, 1866 "To provide for the Revision and consolidation of the Statute laws of the United States" (14 Stat. 74) the President was authorized to appoint three persons, as commissioners "to revise, simplify, arrange and consolidate all statutes of the U. S., general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings" * * * "that the Statutes so revised and consolidated shall be reported to Congress as soon as practicable and the whole work closed without unnecessary delay" * * *.

Nothing seems to have been done under this Act, and on May 4, 1870, the President approved "an Act to provide for the Revision and consolidation of the Statutes of the United States" (16 Stat. 96) which act revised the Act of June 27, 1866. Commissioners were appointed, and from a quotation by Representative Lawrence, in

which he refers to "The Commissioner's Report on Draft of Revision, Vol. I, p. 643, Sec. 4" (Congressional Record, 43/1, p. 825) it will be seen that they submitted their report, and presumably, direct to Congress as authorized by the act; their report was undoubtedly referred to the Committee on Revision of the Laws, and was embodied in House bill 1215 reported by Mr. Poland from that Committee January 14, 1874, who stated that it was not accompanied by a written report of the committee (Congressional Record, 43/1, p. 647). This bill was debated in the House and Senate, amendments made, and finally passed and approved by the President on June 22, 1874.

The Commissioner's Report was printed in 2 volumes. The Alien Enemy Act appears on pages 1957 and 1958 of the Commissioner's Report as Sections 5, 6, 7 and 8 under the title FOREIGN RELATIONS. Section 5 repeats the first part of Section 1 of the original act to the word "Provided". Section 6 repeats that part of Section 1 of the original act which commences with the word "Provided", and does *not omit* the words "resident within the United States". Section 7 of the Commissioners Report repeats Section 2 of the original act, but omits the words "alien or . . . as aforesaid, who shall be". Section 8 repeats Section 3 of the original act, but omits the words "as aforesaid".

On March 3, 1873 Congress appointed a committee of three and authorized it to accept from the commissioners their report, and to discharge said commissioners. Their powers were repealed, but the acceptance by the committee of the report was not to be construed as approval or adoption by Congress of any part of their work. The committee was authorized to contract with a person learned in the law to prepare a bill to be presented on the following December at the opening of Congress with a proper index—so Congress can act on the bill (17 Stat. 579-80).

Pursuant to said authority the committee employed Mr. Durant, an attorney in Washington, D. C., to go over

the work. The committee decided that in their judgment it was not advisable to attempt any change whatever in the existing law. When they employed Mr. Durant they directed him in every case where he found that new legislation had been inserted by the commissioners to strike out such modifications of the existing law. He was directed wherever the meaning of the law had been changed, to strike out such change (Congressional Record, December 10, 1873, p. 646). The committee stated to the Congress that it wished to be able to assure the House that the work had been presented with such changes and amendments as they found necessary to make, "so that it will be an exact transcript, an exact reflex of the existing statute law of the United States, that there shall be nothing omitted and nothing changed" (p. 646). To a question by Congressman Mayhard whether any modification of existing law was contemplated, Mr. Poland, in charge of the bill, replied: "Not at all, ~~the~~ the slightest . . . the design of the committee is not themselves to propose any amendment, that shall change the law, nor to allow anybody else to do so if they can prevent it" (p. 648). And again on page 1028 Mr. Poland said: ". . . My friend seems to have an idea we have a lurking purpose to change the law, when we have determined ourselves, and said so, here and everywhere, and to everybody, not only that we did not intend to do it ourselves, but did not intend to allow anybody else to do it if we could possibly help. . . . The committee do not intend to make or to allow, if they can help, the slightest change in the law."

"We are going through this in a liberal, goodnatured way, and with the understanding, agreed to all around by general consent, if anything is discovered which is wrong, we are to go back and correct it"

The Congressional Record shows, page 1417, that when the Alien Enemy Act came before the Congress in con-

nection with the revision Mr. Hoar proposed an amendment to Section 2 of the Original Act, numbered Section 4132 of the Proposed Revision, by striking out the words "and of each state". He said:

"This section is the original alien act of 1798, and at the time it was passed Congress apparently had not considered the power of the United States to confer jurisdiction on the State Courts. Since then the Supreme Court has held there is no such power . . . as this portion of the act of 1798 does not conform to the Constitution, it could not be considered as a valid part of the existing law, and that the words indicated should be stricken out."

The amendment was agreed to (Congressional Record, 1874, p. 1417).

This section was the only section of the Alien Enemy Act which was read and referred to by Congress during the debates on the revision.

On April 1, 1874 the work of revision was completed. On that date Mr. Poland moved an amendment as an additional title to the bill; he said:

"Mr. Speaker we have offered these provisions so as to guard against every possible harm which can arise to anybody. It may be possible some provision of law has escaped everybody's search. The commissioners went over this work for three years, and Mr. Durant reviewed it all, and after the thorough search our committee have made into it, they do not believe any important provision of law has been omitted in this revision; but it is possible, with all our care something may have been omitted. We have therefore, in drawing these provisions, provided no man's right shall be affected by this repeal in any manner, or form, or any public right, so if it should turn out some provision of law has escaped our reading, and

been omitted in this revision, it will not affect any man's right, but will be only a loss of so much statute law. We think there is no danger in adopting these provisions, which have been most carefully and thoroughly considered."

The bill was adopted and subsequently sent to the Senate, where it was considered on May 27, 1874. Mr. Conkling in charge of the bill, addressing the Senate said:

"I have no expectation that this work is free from error. I have never known any revision of laws that was."

After short debate the bill was passed by the Senate on the same day, May 27, 1874, and on June 22, 1874 was signed by the President.

It has repeatedly been held that a mere change of phraseology, or punctuation, or the addition or omission of words in the revision does not necessarily change the operation or effect of the original law and will not do so unless the intent to make such change is clear and unmistakable.

U. S. v. Cress, 243 U. S. 316;
Baldwin v. Franks, 120 U. S. 678;
Donald v. Hovey, 110 U. S. 619.

Usually a revision of statutes simply iterates the former declaration of legislative will. No presumption arises from changes such as punctuation or phraseology, or the addition or omission of words, that the revisors, or the legislature in adopting the revision intended to change the existing law, but the presumption is to the contrary unless an intent to change it clearly appears.

Anderson v. Pacific Coast S. S. Co., 225 U. S. 187;
U. S. v. Ryder, 110 U. S. 729;

Harlan Coal Co. v. North America Co., 35 Fed. 2 296;

Federal Reserve Bank v. Webster, 287 F. 579.

Where provisions of a statute are carried forward and embodied in a section of a revision or codification, in the same words, or in words which are substantially the same and not different in meaning, the latter provision will be considered a continuance of the old law and not as a new and original enactment.

U. S. v. Bathgate, 246 U. S. 220;

Walsh Construction Co. v. City of Cleveland, 271 Fed. 701.

A change of the law by revision will not be presumed, unless the language in the revision cannot possibly bear the same construction as the revised and repealed act.

Anderson v. Pacific Coast S. S. Co., 225 U. S. 187;

Hermann v. Edwards, 238 U. S. 107;

Federal Reserve Bank v. Webster, 287 Fed. 579, 586.

The foregoing recital of the intention of the revisors as stated to the House and Senate at the time the Revised Statute bill was under consideration clearly shows that no change in the existing law was intended. We have shown that the existing law made special provision for alien enemies resident within the United States. That was the law as it existed on December 1, 1873. That was the intention of the law when the Revised Statutes were enacted. No change in such intent was authorized by Congress. The omissions are clearly not intended. Therefore the original law must apply to Relators' cases. The fact that Congress authorized by the revision the splitting of Section 1 of the original Alien Enemy Act into Sections 21 and 22 of the Revised Statutes does not change

the situation. In such a case it is the duty of the Court to construe the two sections together as in the original act, as was done in *Merchants National Bank of Baltimore v. U. S.*, 214 U. S. 33. Exactly the same situation was presented by that case.

From the foregoing we submit it is clear that Congress intended and enacted that alien enemies resident within the United States should be excepted from the provisions applicable to all alien enemies in so far as their removal was concerned, and reserved to them special rights including the right of full examination and hearing.

When in 1919 the then Attorney General wished to avoid bringing removal cases to court he applied to Congress for authority to deport interned alien enemies without a hearing, merely on the ground that they had been interned. Congress, however, differed, and while granting the Executive the right to deport alien enemies made this right conditional upon giving them a hearing as in all deportation cases, as will be shown in the following point of this brief.

II.

Petitioner is entitled to a hearing. A removal order issued without giving him a fair hearing is invalid.

Petitioner maintains that he is entitled to a fair hearing before the President can order his removal, and that a removal order issued without giving him a fair hearing is invalid. This is not petitioner's unsupported opinion. It is the expressed intent of Congress. The problem is not new. The same situation arose after the armistice of World War I, and before ratification of the Peace Treaty. On February 5, 1919 the United States Attorney General Gregory wrote to Honorable John L. Burnett, Chairman

of the House Committee on Immigration and Naturalization as follows:

"Sir:

At our request you have introduced House Bill No. 14948, the object of which is to provide for excluding and deporting in proper cases persons who, during the war, have either been convicted of war offenses or interned by Presidential warrant as dangerous alien enemies.

There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty. Unless the bill introduced by you, or one similar in character is passed, it will become necessary on the ratification of peace to set free all of these highly dangerous persons.

In view of the gravity of this situation, we therefore take the unusual course of requesting jointly that you take the necessary steps to secure the immediate consideration and, if possible, passage of this measure by the House of Representatives.

Respectfully,

Attorney General,
The Secretary of Labor."

The text of this letter is to be found in the "Hearings before The Committee on Immigration and Naturalization, House of Representatives, 66th Congress, First Session, H. R. 6750, July 16-17, 1919, pp. 42-43.

Mr. Burnett thereupon introduced a bill which died on the House calendar. At the next session Attorney General Palmer on May 27 and August 13, 1919 wrote to the Chairman of the Committees on Immigration, of the

House and Senate, respectively. His letters repeated substantially the statements of Mr. Gregory, and in particular that:

" * * there is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the treaty of peace. * * "

The proposed bill as submitted by the Attorney General provided that the fact of internment was *prima facie* evidence of undesirability. This provision was stricken out by the Committee which had the bill under consideration. The bill as finally enacted provided for a *hearing as in all other deportation proceedings*. Mr. Thompson, a member of the Committee, told the Congress that the Committee was responsible for the language in the bill and that the responsibility was not with the Attorney General's office.

During consideration of the bill Mr. Welty, a member of the Committee, read into the hearing record (p. 20) from the opinion of Mr. Justice Harlan, in *The Japanese Immigration* case, 189 U. S. 86, 100, as follows:

"But this court has never held nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons may disregard the fundamental principles that inhere in 'due process of law', as understood at the time of the adoption of the Constitution. * * "

Mr. Welty also read from the opinion of Mr. Justice Day in *Low Wah Suey*, 225 U. S. 460, 469:

"A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclu-

sions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute."

The Committee reported the bill with an amendment, *unanimously recommended passage of the bill as amended* (Report No. 143), and stated that internees "*will be given full hearing, as in all cases of deportation under existing laws*".

During debate on the bill Representative Baker, a member of the Committee, stated:

"* * * there might be in the heat of war some man who might have been interned without just cause. We believed that in justice to everyone, while the matter is now passed over, that the man before being deported should be given a full and fair opportunity to be heard, and if he can show an injustice to himself * * * he should have the opportunity to do so" (Congressional Record, July 30, 1919, 3363).

And Mr. Moore of Pennsylvania also during debate on the bill said:

"In its original form the bill admitted of the deportation of a man who had simply been sent to an internment camp, a proceeding which I regard as very dangerous and destructive of the rights of man, because if a man had been sent to a camp without anything to support his internment, except the suspicion of somebody who did not like him, it might place him wholly in the hands of another man, or of some autocratic power, which wants to get rid of him without justice and without humanity" (Congressional Record July 30, 1919, 3363).

The bill was passed by both the House and the Senate without a dissenting vote and became law on May 10, 1920 at 41 Stat. 593. It is significant that Congress, though it specifically referred to Section 4067 of the Revised Statutes in Section (1) of the new law, did not use the word *removal*, but used the word *deport* in the title and the word *deported* in the text of the law.

The Act of May 10, 1920 provides in part as follows:

"* * * That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, * * * be deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, if the Secretary of Labor, *after hearing*, finds that such aliens are undesirable residents of the United States, to wit:

(1) All aliens who are now interned under section 4067 of the Revised Statutes of the United States and the proclamations issued by the President in pursuance of said section under date of April 6, 1917, November 16, 1917, December 11, 1917, and April 19, 1918 respectively". (C. 174, 41 Stat. 593).

When the United States Attorney General expressed the opinion that there was "no law now on the statute books under which internees could be excluded from the country," he had before him the Alien Enemy Act, for §4067 of the Revised Statutes, mentioned in the Act of Congress, is that act itself. In saying that these persons could not be "excluded" from the country, he certainly meant "expelled" as well as "denied readmission". Excluded commonly means expelled, and they certainly had to be expelled before they could be kept out.

Not only the Attorney General, but also his then assistants in charge of interned alien enemies, John Lord O'Brian, John T. Creighton and John Hanna (now Professor of Law at Columbia University), were of the opinion that before the enactment of the law of May 10, 1920

there was no law on the statute books under which alien enemies could be removed, at least as far as the Executive Power is concerned. ~~Then as now action could~~ have been brought in court upon complaint, but it was not done. Instead the power to do it by executive action alone was asked and obtained from Congress.

The writer of this brief interviewed Professor Jolin Hanna concerning the history of the Act of May 10, 1920, and was informed that to his best recollection there exist in the files of the Justice Department memoranda and correspondence supporting the opinion expressed by Attorney General Gregory in his letter to the Chairman of the House Committee on Immigration. In view of this information the manner in which the entire episode of the Gregory opinion and the act of Congress of May 10, 1920 were handled in the *Citizens' Protective League* case, is of paramount interest. The text of the Gregory opinion was not submitted, and in the *Citizens' Protective League* case, the Government which was the only one to refer to the Gregory opinion, argued without presenting the opinion itself that the Attorney General *had affirmed* the President's power to remove. The text of that opinion, however, is directly to the contrary. It stated:

"There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty."

It is respectfully submitted that the statement in the *Citizens' Protective League* case that "a reading of these letters gives no information as to the reasons for the conclusion that new legislation was essential," is wholly inadequate when the clear language of the opinion can be read.

We submit that the re-enactment by Congress without change of a statute which had previously received long continued executive construction is an adoption by Congress of such construction.

U. S. v. Hermanos, 200 U. S. 337-339;

U. S. v. Falk, 204 U. S. 143, 152;

Mayes v. Paul Jones Co., 270 Fed. 121, 122.

In the *Mayes* case the Court said:

"Congress is presumed to have known the long-continued executive construction given to paragraph 3 of section 3244, R. S., when it enacted this Revenue Act of October 3, 1917. It is also presumed to have known the rule of construction announced by the Supreme Court in *U. S. v. Hermanos* and *U. S. v. Falk*, *supra*. *Buckley v. Stephens*, 29 Ohio St. 620-622. The conclusion follows that it intended to adopt this construction as fully and completely as if it had written it into the act itself."

"* * * In the construction of a statute it is the duty of the court to give full force and effect to the intent and purpose of the law-making power responsible for its enactment. If this intent and purpose can be ascertained from the language of the statute itself, then that language must control."

At the time Congress adopted the Act of May 10, 1920 there had been a long continued executive construction given to the Alien Enemy Act by the Executive. Congress having adopted that construction the Executive was no longer at liberty to change that construction.

We concede that during actual hostilities hearings might in some cases have hampered our war efforts or given aid to the enemy. But now that Germany is vanquished and hostilities have been officially terminated that reason for refusing a hearing no longer exists. This apparently also was the judgment of Congress in 1920. On this point we respectfully quote Judge Mayer of this Court in the *Gilroy* case:

"Vital as is the necessity in time of war not to hamper acts of the Executive in the defense of the

nation and in the prosecution of the war, of equal and perhaps greater importance is the preservation of constitutional rights."

If even war criminals are given a trial, told the charges, and permitted to be represented by counsel, why should these rights be denied to petitioners?

III.

The declaration of war by or against his country of origin does not suspend or annul a legally resident alien's right to due process of law.

A. War powers are subject to constitutional limitations.

The Alien Enemy Act is strictly a war measure. It is dormant in times of peace. It comes into effect only in time of war. The powers of Congress to authorize measures for the prosecution of war, comprehensive though they are, are by no means unlimited. There still remain in force, in war as well as in peace, the general constitutional limitations upon the exercise of federal powers.

In *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, this Court said:

"The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

And in *United States v. Cohen Grocery Co.*, 255 U. S. 81, it declared:

"The mere existence of a state of war could not suspend or change the operation upon the powers of

Congress of the guaranties and limitations of the
Fifth and Sixth Amendments."

These constitutional guarantees include the right to due process, the rule of law.

B. Even though petitioner is an alien enemy he is entitled to due process of law.

In the first *Schlueter* case, 67 Fed. Supp. 556, it was held that an alien enemy had no right to a hearing and therefore may not complain about an unfair hearing. We sharply take issue with that position. True, in the barbaric days of Rome prisoners of war had no rights and could be used by the victor to stage gladiatorial contests, paraded in chains, enslaved, etc. But we are a Christian Nation, and we hope, far removed from such practices, which are repugnant to the principles of Christianity. Grotius, "On the Usage of War", shows that even in his days alien enemies had rights. The Geneva Convention of 1929, and the Hague Convention of 1908 on the treatment and rights of prisoners of war certainly have modified the old idea that prisoners of war have no rights. Some ill-informed persons have said that we are no longer bound by the Geneva Convention after the German surrender. This is not correct. By its terms the Convention may not be denounced by a signatory during a war in which the denouncing party is involved. For the United States the Geneva Convention continues in effect at least until the conclusion of peace. And, of course, the mainstay of the Government's argument in petitioner's case is that while hostilities have ceased, the state of war still exists, because as yet there is no peace.

The widely publicized purpose of the Nuernberg trial was to establish the supremacy of law and treaties, and to do away with the old-fashioned idea that war sanctions everything, that the victor may do with the van-

quished as he chooses, merely because he is the victor. The Nuernberg trials were held to punish war criminals for doing the very thing which the Government claims it has the right to do to petitioner, and all other alien enemies: To treat them as if they had no rights.

Further the Emergency Advisory Committee for Political Defense, of which the United States is an active and directive member, recommended that interned civilians be treated as prisoners of war under the Geneva Convention (Committee's Annual Report, July 1943, p. 78). On May 23, 1942 the State Department Bulletin, page 445 stated that the Government of the United States would, "in accord with its previous declaration to the German Government, apply to German nationals interned in the United States the provisions of the Geneva Convention". In view of this we submit that the decision in the first *Schlueter* case is in error, and that prisoners of war do have rights which must be respected. Due process of law is one of those rights.

This Court in *Chambers v. Florida*, 309 U. S. 227 said:

"All people must stand on an equality before the bar of justice in every American court. Under our court system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."

Except for the difference in the respective political beliefs involved, the cases of Harry Bridges and that of petitioner involve the same essential issue. Bridges was to be deported because he was said to be a member of an organization advocating the forceful overthrow of our Government. Petitioner is to be "removed" for "adhering" to a government which we have overthrown. In both cases violence is done to our fundamental American

principle that ~~guilt is personal, and may not be imputed~~ by association.

Like Bridges, petitioner is to be deported because guilt is imputed to him by association. The Attorney General has deemed that petitioner "adhered" to the enemy. The same ruling applies to all enemy aliens now detained on Ellis Island under removal orders. No distinction is made in individual cases. None of the alien enemies have been given a fair opportunity to refute the to them unknown charges against them. Yet we know today of many Germans who were opposed to the Hitler government, that there was an active underground movement against Hitler. We submit that only by individual examination, by trial or fair hearing can it be determined who should be removed, and who should be released.

Denial of a fair hearing condemns petitioner and the other alien enemies for beliefs and teachings to which they may not personally subscribe, and as to many of which they may not even be sure that they know or understand them. That fact alone is enough to invalidate the removal orders. Again we stress: It is not the Legislation which is at fault, but rather the interpretation of the law by the Executive. The evil we complain of can readily be cured by giving each alien enemy a fair hearing in accordance with American standards of fairness and justice.

C. The removal orders deprive petitioner and the other alien enemies of their property without due process of law.

Under the Potsdam Declaration, and the Paris Reparation Agreement of January 24, 1946, as well as the Agreement reached at Brussels, on November 21, 1947, by the Inter-Allied Reparation Agency, the property of petitioner, and of all the other alien enemies ordered removed, is subject to confiscation as reparations. Article 6A of the Paris Agreement provides that each country shall hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German

ownership or control. Assets subject to seizure are, among others, those of:

3. An individual who, as a German national, has been compulsorily repatriated to Germany since January 24, 1946, or is intended to be compulsorily repatriated to Germany."

Under this provision any of the alien enemies ordered removed is subject to loss of his life savings, as is actually the situation in the case of one man who slaved in bakeries for some 20 years, whose savings account has been "blocked", and is subject to seizure by the Alien Property Custodian, solely because there is a removal order outstanding against him. This presents a clear case of depriving the aliens of their property without due process of law.

D. The removal orders are invalid because they were made by the Attorney General, and not by the President who could not lawfully delegate to the Attorney General a judicial function.

Section 1 of the original Alien Enemy Act authorizes the President to direct the conduct to be observed on the part of the United States toward alien enemies. He is given summary discretion. When limited to internment his action is conclusive and not subject to judicial review. But the proviso in Section 1, and the language of Section 2 providing for full examination and hearing by a court in the cases of aliens *resident within the United States* shows that Congress intended residents to be treated differently than those who were not residents.

The Proclamation dated July 14, 1945 shows that the President has attempted to delegate to the Attorney General the power to decide who is dangerous. The wording of the Proclamation is: "who shall be deemed

by the Attorney General to be dangerous * * *. Deemed means to form a judgment, to have an opinion, to judge, to sit in judgment on. To deem is to exercise a judicial function. The Alien Enemy Act imposes that function on the President. It does not authorize him to delegate this judicial function.

When by express statutory declaration it is evident that the personal individual judgment of the President is required to be exercised, the duty may not be transferred by the President to any one else.

Runkle v. U. S., 122 U. S. 543;

Weeks v. U. S., 277 F. 549, 578, Affd. 259 U. S. 336;

Meyers v. U. S., 272 U. S. 52;

U. S. Chemical Foundation v. U. S., 272 U. S. 1.

Nor can the powers of the Legislature be delegated. The definition of offenses, the classification of offenders, and the prescription of penalties are legislative and not executive functions. *U. S. v. Eleven Thousand Pounds Butter*, 195 Fed. 657, Affmg. 188 Fed. 157. The power of administrative officers to prescribe regulations does not carry with it the power to make law. *U. S. v. Powell*, 95 Fed. 2d 752; Cert. denied, 305 U. S. 619.

Nor can a right granted by the Legislature be limited or defeated by a rule adopted by the Executive. *Klein v. U. S.*, 13 Cust. Ct. App. 273. The Executive can act only subordinate to the judicial department, where rights of persons or property are concerned. The duty of the Executive in those cases consists only in aiding to support the judicial process, and enforcing its authority, when its interposition for that purpose becomes necessary. *Kentucky v. Dennison*, 65 U. S. 66.

Article I, Section 1 of the Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States, * * *. Determination

of the meaning of Congressional Acts is a judicial function which is beyond the power of control of the Executive." *Walker v. U. S.*, 83 Fed. 103. An administrative regulation may not be used to amend the plain terms of a statute under guise of interpreting it. *R. E. Schanzer v. Bowles*, 141 Fed. 2d 262.

The Government's interpretation of the Alien Enemy Act constitutes an improper delegation of a judicial function to the Attorney General, enabling him, rather than the courts, to sit in judgment. Since the Attorney General is the arresting officer, this is tantamount to making the Executive the law-maker, the prosecutor, the judge, and the executor of his own policy, all contrary to our fundamental principle of separation of powers.

We submit that War Powers are subject to constitutional limitations; that the Alien Enemy Act must be read as a whole, and that when so read makes specific provision for a trial or fair hearing before removal of aliens who are residents; that this was the intent of Congress when the Alien Enemy Act originally was adopted in 1798, and certainly when Congress enacted the law of May 10, 1920 requiring a hearing for all aliens to be deported under Section 4067 of the Alien Enemy Act; that Congress having thus expressed its intent, and having thus interpreted the Alien Enemy Act the Executive is bound thereby.

In insisting on due process of law for enemies we do not wish to favor enemies as against our Government. We simply have in our mind Tom Paine's maxim:

"He that would make his own Liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent, that will reach himself."

IV.

When the orders of removal were issued, there was no longer a "war" and appellants were no longer "alien enemies" as defined in the Act of July 6, 1798.

At the outset, it should be made clear that the powers of the Executive with respect to removal are comparable neither to the powers of court-martial, nor to the powers authorizing the punishment of war criminals (see *Kahn v. Anderson*, 1921, 255 U. S. 1, 9; *Matter of Yamashita*, 1946, 327 U. S. 1, 9-11, relied on in *United States ex rel. Schlueter v. Watkins*, *supra*). The power of the Executive to direct removal flows exclusively from the Alien Enemy Act of July 6, 1798.

A study of the congressional debates which preceded the passage of this Act in 1798 will establish beyond question that in using the words "declared war" and "hostile nation or government," the legislators had in mind "war in fact" or "actual hostilities" and not a mere technical "state of war."

When this act was written in the Spring of 1798, two grave problems faced the legislators. One was the tremendous power being asserted over all Europe by the French, a power which even then threatened to spread across the Atlantic and engulf the United States (see *Bas v. Tingy*, 1800, 4 Dallas 37, at 40). The other, was the serious internal struggle between the States and the Federal Government for the control of migration of aliens. As Albert Gallatin pointed out during these very debates

"* * * by turning to the 9th section of the Constitution, it is found that the migration of such persons [aliens] as any of the States shall think proper to

admit, shall not be prohibited by Congress prior to the year 1808."¹

Thus, on the one hand, there was the desire to give the Executive the power to deal with French nationals in the case of actual hostilities without a declared war. And on the other, there was the recognition that until 1808, the power over aliens rested exclusively with the States, except in the case of a "declared war." So strong was the legislative intent that the Executive should have the power in the case of actual hostilities, and only in such event, that it is most doubtful that the words, "declared war" would have ever appeared in the statute but for the constitutional problem existing until 1808.

Albert Gallatin described this dilemma when speaking with respect to a motion of Congressman Sitgreaves, who had suggested that the aliens who should be subject to removal, should be natives, citizens, etc., of any nation which had "declared hostilities against the United States." Responding to the motion, Albert Gallatin said, at pages 1581-2 of the Congressional Record for Thursday, May 3, 1798:

"He would suggest to his colleague that part of the Constitution which might be in the way of this motion. A distinction was made by it between actual hostility and war.

If it had only gone to have made a difference between *declared* and *actual* war, by striking out the word 'declare,' it would have removed the [Constitutional] objection. If there be a difference between a state of war and actual hostility, there is also a difference in the relation between alien subjects of a nation with whom we are at war, and those of a nation with whom we are in a state of actual hostility."

¹ 2 Annals of Cong., 5th Cong., 2d Sess. 1581.

Because the legislators finally adopted the phrase "declared war" in order to afford the *Federal Government* with the necessary constitutional authority, it does not follow that they intended that the *Executive* should possess this extraordinary power at times other than "actual hostility" or "war in fact."

That Congress intended this power of the Executive to be coterminous with actual hostilities is demonstrated beyond question by the principal debates. Congressman Otis of Massachusetts, the leading proponent of the bill, spoke of its purpose, as follows:

"It is proposed by this resolution to give the President the power to remove aliens, when the country from which they came shall threaten an invasion."²

"Gentlemen talk about a declaration of war. No such thing scarcely ever precedes war. War and the declaration of war come together, like thunder and lightning. Indeed, if France finds she can enfeeble our councils by refraining to declare war, and that we will take no measures of effectual defense until this is done, it is probable she will not declare it, but continue to annoy us at present."³

Further indication of the fact that the legislators were thinking of war in terms of actual hostilities was the statement of Congressman Sewall, himself an outspoken opponent of the bill,

"France, said he [Mr. Sewall], has now done towards the United States what might be considered as *hostility*. Suppose we pass a law which calls upon the President to act, what ought the President to do?

² 2 Annals of Cong., 5th Cong., 2d Sess. 1575 (1798).

³ 2 Annals of Cong., 5th Cong., 2d Sess. 1581.

Was he to determine the point whether France has authorized *hostilities* against the United States?"⁴

Almost conclusive proof, that the legislators were aiming to limit the powers of the President is an amendment which Congressman Allen proposed and was thereafter obliged to withdraw.

"Mr. ALLEN said, he would move an amendment which would supersede that under consideration, by making the resolution extend to *all aliens* in this country. He wished to retain none of the restraints which are in the present resolution."⁵

"It did not appear to him necessary to have the exercise of this power depend upon any contingency, such as a threatening of invasion, or war, before it could be exercised. He wished the President to have it at all times. He moved an amendment to this effect, which went to enable the President to remove at any time the citizen of any foreign country whatever, not a citizen, regarding the treaties with such countries."⁶

That the legislators intended that war as included in the Alien Enemy Act should be "war in fact" and not a technical "state of war" is conclusively established by their failure to adopt those very terms. They were proposed in a motion by Congressman Sewall to define those aliens who should be subject to the liabilities of this act as those of a government

"between which and the United States shall exist a state of war."⁷

⁴ 2 Annals of Cong., 5th Cong., 2d Sess. 1575 (1798).

⁵ 2 Annals of Cong., 5th Cong., 2d Sess. 1578 (1798).

⁶ 2 Annals of Cong., 5th Cong., 2d Sess. 1578 (1798).

⁷ 2 Annals of Cong., 5th Cong., 2d Sess. 1580 (1798).

Congressman Otis strongly opposed this definition of "war" on the ground that it might not permit the use of the power in a case of actual hostilities apart from a state of war.⁸ He had previously stated:

"* * * that in a time of tranquillity, he should not desire to put a power like this into the hands of the Executive; but in a time of war, the citizen of France ought to be considered and treated and watched in a very different manner from citizens of our own country."⁹

Were there any question as to the intent of the legislators at that time, the Court is respectfully referred to James Madison's report on the Virginia Resolutions, which is quoted from by Judge Rifkind in the *Schluter* case, at 67 F. Supp. 564, as follows:

"* * * much confusion and fallacy have been thrown into the question, by blending the two cases of aliens, members of a hostile nation; and aliens, members of friendly nations."

In the light of this record, there can be no doubt that Congress in passing the Alien Enemy Act and in using the words, "declared war" and defining who were subject to removal as natives, etc., of a "hostile government or nation" were granting the Executive these extraordinary powers solely during times of actual hostilities or "war in fact" and not during the tranquillity of a theoretical "state of war."

This undoubtedly was what led United States Attorney General Gregory to the conclusion expressed in his opinion to Congress after the first war. The reasons for adopting his view are even more compelling after this war. Unlike the Armistice of the first war, in this war the termination of hostilities was carried out by the unconditional surrender of all forces under German control.

⁸ 2 Annals of Cong., 5th Cong., 2d Sess. 1581 (1798).

⁹ 2 Annals of Cong., 5th Cong., 2d Sess. 1791 (1798).

The military surrender was followed by a Presidential Proclamation on May 8, 1945 reading in part as follows:

"BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A Proclamation

The Allied armies, through sacrifice and devotion and with God's help, have won from Germany a final and unconditional surrender." (Dept. of State Bull., Vol. XII, No. 307, p. 886, May 13, 1945.)

On June 5, 1945, the Department of State of the United States Government, officially declared the total demise of the German State in a proclamation reading in part as follows:

"DEPARTMENT OF STATE

June 5, 1945

No. 480

CONFIDENTIAL RELEASE FOR PUBLICATION AT 11:00 A. M., E. W. T., TUESDAY, JUNE 5, 1945. NOT TO BE PREVIOUSLY PUBLISHED, QUOTED FROM OR USED IN ANY WAY.

DECLARATION

regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic.

The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.

The Representatives of the Supreme Commands of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the French Republic, hereinafter called the 'Allied Representatives,' acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:—

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.

On October 29, 1945, the Allied Control Council for Germany issued Proclamations No. 1 and No. 2 with respect to its powers and activities over Germany and German nationals. These proclamations read in part, as follows:

"PROCLAMATION No. 1

To the people of Germany:

I

As announced on 5 June 1945, supreme authority with respect to Germany has been assumed by the

Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

II

In virtue of the supreme authority and powers thus assumed by the four Governments the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council.

Done at Berlin, 30 August 1945.

DWIGHT D. EISENHOWER
General of the Army

B. H. ROBERTSON,
Lt. Gen.

Deputy for:

BERNARD L. MONTGOMERY
Field Marshal

L. KOELTZ
General de Corps d'Armee
pour P. KOENIG
General de Corps d'Armee

G. ZHUKOV
Marshal of the Soviet Union

"PROCLAMATION No. 2

SECTION III

6. The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party.

7. (a) In virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular, commercial and other relations of the German State with other States have ceased to exist.

8. (a) German nationals will, pending further instructions, be prevented from leaving German territory except as authorized or directed by the Allied Representatives.

(b) German authorities and nationals will comply with any directions issued by the Allied Representatives for the recall of German nationals resident abroad, and for the reception in Germany of any persons whom the Allied Representatives may designate."

In view of the foregoing proclamation and in view of the official declaration of the Department of State previously quoted, declaring the complete demise of the German Government, the cessation of actual hostilities and the assumption of *supreme authority* by the Allied Powers as to every function of the former German Government, it is respectfully submitted that not later than October 29, 1945, the *political branch* of the United States Government had ended the war with Germany so far as the Alien Enemy Act of 1798 is concerned.

By May, 1946, when the orders of removal as to petitioner and the other detainees were issued, there was neither any "hostile nation or government" of which they were native or citizens, nor any such entity against which the United States could any longer be at war within the purport of the Alien Enemy Act.

This Court has held that a proclamation of the President is sufficient to mark the close of war. In *The Protector* (1871), 12 Wal. 700, 702, the Chief Justice said:

"It is necessary, therefore, to refer to some public act

of the political departments of the government to fix the dates;"

"The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second."

To the same effect see *Adger v. Alston* (1872), 15 Wal. 555, 560; *Brown v. Hyatts* (1872), 15 Wal. 177, 184.

Not only can war be ended by presidential proclamation, but it can end by "subjugation" as well as by formal treaty of peace, as stated by Oppenheim, *International Law* 261, 262:

"... a war may be terminated in three different ways. Belligerents may, first, abstain from further acts of war and glide into peaceful relations without expressly making peace through a special treaty. Or, secondly, belligerents may formally establish the condition of peace between each other through a special treaty of peace. Or, thirdly, a belligerent may end the war through subjugation of his adversary."

"262. The regular modes of termination of war are treaties of peace or subjugation, * * *"

The present war has been terminated by subjugation. As Mr. Byrnes, Secretary of State, formally proclaimed: the Conference of Foreign Ministers in Paris on July 1, 1946:

"While there is no German Government with which a peace treaty can be made, it is of the utmost importance that the Allies should without delay agree among themselves upon the peace settlement which they wish to have German authorities accept."

"It is not necessary that there be at that time a German government to accept the settlement. It is essential that the Allies be agreed upon a peace settlement in order that the Allies should know the kind of settlement toward which the Allied occupation and administration should be directed until a German government can be created to accept that settlement."

In simple everyday language, this war, as defined in the Alien Enemy Act, has ended because the enemy has been wholly annihilated—the subjugation is complete.

In this connection, particular emphasis is placed on the Presidential Proclamation of May 8, 1945, stating that here had been won "from Germany a *final* and unconditional surrender". In other words, the President has made "public proclamation of the event" (see Sec. 1, Act of July 6, 1798), that so far as Germany is concerned, no further act of war or peace can be done. The capitulation is *final*. When this extraordinary event was followed by the official proclamation of the United States Department of State that the four Powers were assuming all functions of the extinct German Government, the political branch of the Government has most certainly declared an end to the war as provided in the Alien Enemy Act.

This aspect of *political* action is emphasized because it has been the practice of the courts in cases dealing with the Alien Enemy Act to avoid the issue of war termination by stating that this is a political question.

For example, in *United States ex rel. Hack v. Clark* (C. C. A. 7th, 1947), 159 F. 2d 552, at 554, it is stated:

"Whether the country from whence he came is still at war with the United States or is still in existence as a sovereign power is not for any court to say; that is a *political question to be answered only by those branches of our Government charged with the*

responsibility of political decisions, namely, the executive and legislative branches. Jones v. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; Citizens Protective League v. Clark, supra."

There is no disagreement with the principle asserted in this line of decisions. On the other hand, where the political branch of the Government has taken the steps proclaiming the *final defeat*, the complete demise and the substitution of its own power in the place of the hostile nation or government, that action compels judicial recognition in the application of a statute such as the Alien Enemy Act.

In Japan the Emperor and his government still function, although they have surrendered. But the government of Germany has been abolished and the existence of Germany as a sovereign state has been destroyed. Hans Kelsen, an authority on international law, in the *American Journal for International Law*, July 1945, in an article entitled "The Legal Status of Germany According to the Declaration of Berlin", writes:

"By abolishing the last government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz Government, Germany has ceased to exist as a state in the sense of international law. Germany having ceased to exist as a state, the status of war has been terminated, because such a status can exist only between belligerent states. Since Germany's surrender, at least since the abolition of the Doenitz Government, the Hague Regulations are not applicable, and the legal status of the territory occupied by the victorious powers cannot be that of belligerent occupation."

The mere fact that power is bestowed upon the Executive during a period of actual emergency does not justify usurping it to accomplish purely political objectives when the time of military danger has passed. During an emergency there can be no question of the necessity of giving the Executive power to intern any alien enemy. Internment is a temporary protective measure, and ceases when the danger has passed. Removal on the other hand is not a temporary, but a permanent measure. Its consequences are too serious to permit the Executive to order removal without at least giving the alien enemy an opportunity to be heard and to disprove false accusations.

If the Alien Enemy Act, as originally passed, be read in that light it will be seen that Congress gave the Executive the power to intern all alien enemies as an emergency protective measure, but provided for a full examination and hearing in the cases of alien enemies resident within the United States before they could be removed. Thus the country as well as the vested rights of alien enemies resident within the United States were protected.

V.

The orders of removal are violations of the constitutional prohibition of bills of attainder.

Bills of attainder are generally directed against individuals, but they may be directed against a whole class. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death the act is termed a bill of pains and penalty. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these the legislative body, in addition to its legitimate functions, exercises the powers and office of judge.

Bills of attainder are such special acts of legislation as inflict punishment or pains or penalties upon persons

supposed to be guilty of high offenses, without any conviction in the ordinary course of judicial proceedings.

Cummings v. Missouri, Mo. 1867, 4 Wall. 323;

Anderson v. Baker, 23 Md. 623;

Fletcher v. Peck, Mass. 1810, 6 Cranch 138.

We submit that the removal order served on Relators herein without a fair hearing is a bill of attainder if the Government's contention that they are not entitled to hearings or trials is upheld. The Alien Enemy Act construed in that manner is equivalent to a bill of attainder and therefore unconstitutional. On the other hand if the Relators are given a trial on complaint made, or a hearing as provided in the Act of May 10, 1920, they will then enjoy the privilege of due process of law, and cannot complain that the Alien Enemy Act is unconstitutional because it denies them due process of law.

VI:

The removal orders are invalid because they are issued in violation of the terms of international treaties to which the United States is a party.

The removal order served on petitioner was issued without trial or fair hearing, and in violation of international treaties to which the United States is a party. They are:

(a) Treaty of Friendship, Commerce and Consular Relations between the United States and Germany, dated December 8, 1923, proclaimed October 14, 1925. 44 Stat. 2132.

(b) Extradition Treaty between the United States and Germany, signed July 12, 1930. 47 Stat. 1862.

(c) Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro September 2, 1947.

(d) The Geneva Convention of 1929.

(e) The Hague Conventions.

A. Treaty of Friendship with Germany of October 14, 1925.

This Court on June 9, 1947 in *Clark v. Allen*, 91 Ad. Op. 1285 held that the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, was not abrogated.

The State Department in a letter to the Attorney General dated May 21, 1945 stated that it considered the treaty provisions of the Treaty of 1923 as in force during the war with Germany.

Article I of the Treaty of 1923 provides in part:

“ . . . The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.”

Yet Respondent claims that petitioner has no right to a trial or a fair hearing, even though liberty, family and property rights are involved.

The proviso in Section 1 of the Alien Enemy Act established petitioner's right to a full examination and fair hearing before a court, or an administrative tribunal. Congress certainly provided for a hearing in removal cases in the Act of May 10, 1920. The Constitution and all treaties made under it are the supreme law of the land. The Treaty of 1923 provides freedom of access to the courts for the prosecution as for the defense of petitioner's rights. Therefore, if for no other reason, the Treaty of 1923 entitles petitioner to a fair trial or hearing on the merits. He has had neither. Therefore, the

removal order is invalid. (*Flensburger v. U. S.*, 59 Fed. 2d 464, cert. den. 286 U. S. 564.)

B. The Extradition Treaty signed July 12, 1930.

On July 12, 1930 the United States and Germany signed an Extradition Treaty (47 Stat. 1862), which provides that persons cannot be extradited if they are accused of a political offense. Petitioner is not charged with any crime or violating any law of the United States or Germany. Respondent simply accuses him of "adhering" to an enemy government. That enemy government no longer exists. It has been replaced by the Allied Control Council. If the German government still were in existence, the treaty would prohibit extradition because petitioner's offense, if any, is strictly political. On the other hand if the Allied Control Council be considered petitioner's enemy, then extradition is improper, because again it is strictly for a political offense, and would subject petitioner to punishment by his political enemies for his political beliefs.

In the case of Horn, an alien enemy interned in the United States in 1917, for whose extradition Canada applied, the Department of Justice considered doubtful its authority to deliver Horn to Canadian authorities.

In the case of Franz Rittelen, a German subject, held as a prisoner of war in England, whom the United States wished to extradite from England, the British government opposed the extradition. (*Hackworth's Digest International Law*, Vol. 4, pp. 66-68.)

In the absence of an extradition treaty there is no obligation to deliver to another nation a fugitive from justice, *U. S. v. Rauscher*, 119 U. S. 407. The only authority for extradition of petitioner, if there be such authority, must be found in the extradition treaty with Germany. Its provisions forbid extradition for a political

offense. Petitioner is not a fugitive. At most he can be said to be charged with a political offense. Therefore he cannot be extradited.

We concede that Respondent is avoiding the use of the word "extradition", just as he is avoiding the use of the word "deportation". A rose by any other name smells just the same. Calling the procedure a "removal" does not change the fact that Respondent is attempting to do indirectly what the law forbids him to do directly.

C. Inter-American Treaty of Reciprocal Assistance.

The United States ordered the removal of petitioner, and then prevented him and others from going to any country of his choice by requesting all American Republics and European and Far- and Near-East Governments to refuse to issue him a visa, or a permit to immigrate (Appendix A and B). In doing so it relies upon the Act of Chapultepec, adopted in Mexico City in March 1945, which is neither a law, nor a treaty, nor even an executive agreement. It is merely a recommendation, which has never been submitted to, nor ratified by Congress. It was an emergency wartime measure. The State Department Bulletin for November 23, 1947 at page 983 says:

"The Act of Chapultepec was, however, a temporary wartime measure in the form of a simple resolution and was concluded prior to the time when the adoption of the Charter of the United Nations set the permitted patterns for regional security arrangements."

The regional security arrangements referred to have been made in the form of the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on September 2, 1947. In it

.. . .

"The High Contracting Parties reaffirm the adherence to the principles of inter-American solidarity

and cooperation, and especially to those set forth in the preamble and declarations of the Act of Chapultepec, all of which should be understood to be accepted as standards of their mutual relations and as the juridical basis of the Inter-American System;

“the American regional community affirms as a manifest truth that juridical organization is a necessary prerequisite of security and peace, and that peace is founded on justice and moral order and, consequently, on the international recognition and protection of human rights and freedoms, on the indispensable well-being of the people, and on the effectiveness of democracy for the international realization of justice and security.”

On April 12, 1946 the Emergency Advisory Committee for Political Defense, approved RESOLUTION XXVII ON THE EXPULSION AND NON-ADMISSION OF DANGEROUS PERSONS. This resolution contains the standards by which it judges whether a person is dangerous. This Committee issued a policy directive stating “that discriminatory measures must be taken against Axis nationals” (Committee's Annual Report, July 1943, p. 10) and in its Second Annual Report covering July 1943 to October 1944 freely admitted:

“Concerning the present program of the authorities for the revocation of the naturalization of disloyal citizens, the Committee's delegation was informed that this program has been expressly limited for reasons of policy to individuals whose former nationality was that of an enemy country so that they could be interned as alien enemies after their naturalization was canceled” (p. 121).

In view of this attitude by the committee we may assume that the standards approved in Resolution XXVII

are not too lenient, let alone judging them by democratic standards of justice and fairness. Yet even the standards set forth in Resolution XXVII have been violated in determining that petitioner is subject to removal. Said standards are in part as follows:

"A. CRITERIA FOR DETERMINING WHETHER A PERSON IS DANGEROUS.

The fundamental problem in this matter consists in establishing uniform standards that will serve all the American Governments in determining whether a person is dangerous. In the application of these norms and criteria, there should be considered not only the present danger but also the potential danger of the individual.

These criteria as to who is a dangerous person will indicate when measures of expulsion or non-admission are to be decreed except where there exist certain special circumstances which are mentioned below.

1.

However, the criterion by which expulsion is to be decided upon should be stricter than that applied in some countries for internment, in as much as the latter constituted a preventive measure of military security against imminent dangers of sabotage and violence.

2. Circumstances that exempt from expulsion or suspend the effects of this measure.

The committee suggests, with respect to the less dangerous persons only, that there be taken into account certain special circumstances as mentioned below.

a. *Exempting circumstances.*

(1) *Adherence to the Axis by coercion.* In certain cases, a person who has engaged in activities which give evidence of his adherence to the Axis will be able to prove that he acted against his will or under threat. . . .

In its milder form, coercion was exercised by means of economic pressure, as for example, the boycotting by German communities in America of those who were reluctant to support Axis plans. . . .

Bearing in mind the repeated perpetration of these abominable acts, the Committee recommends that those persons who invoke this excuse be granted a hearing and other opportunities necessary to attempt to prove coercion. . . .

(2) *Retraction of adherence to the Axis.* The Committee recommends, likewise, that there be taken into account the case of those persons who have committed themselves in favour of the Axis in any of the activities referred to in this Resolution, but who, prior to or at the time of the aggression against this Hemisphere, have demonstrated that they have definitively broken all ties with such activities. . . .

b. *Personal or family situation.*

In cases where, on account of expulsion or repatriation, the life of the person expelled might be seriously endangered because of illness or advanced age, it is also advised that the measure be suspended.

Another special circumstance, among those most frequently invoked to escape expulsion, is that the spouse or children of the dangerous person are nationals of an American Republic. In this Resolution, (subsection c) of Section 3), such a situation is contemplated. . . .

c. *Long residence.*

Several American Republics have considered the possibility of fixing a minimum period of residence that would prevent expulsion."

It will be noted that the resolutions quoted above provide for a hearing. Yet Respondent insists he does not have to give petitioner a hearing, and therefore he may not complain about an unfair hearing.

The personnel which constituted the Attorney General's hearing board, which ordered petitioner removed, were the same persons who made the rules, served on, or consulted with, the Emergency Advisory Committee for Political Defense. The original hearing board was Edward J. Ennis, Chief Alien Enemy Control Unit, Department of Justice, his assistant John L. Burling, and C. Edward Rhett, Special Assistant to the Attorney General. After Ennis's resignation his place was taken by Thomas H. Cooley, II. (Page 151 of the Emergency Advisory Committee's Report for 1944.)

Resolution XXVII paid lip-service to the principles of democratic fairness by providing for a hearing. The hearings were prejudged, and were anything but fair. The proceeding throughout was totalitarian. When motions were made to compel the Government to produce its files in the *Schlueter* case so that we could show the Court there were no valid charges, or any evidence which would justify *Schlueter's* deportation or removal, the purge-trial principles underlying these removals were revealed by the Government's plea that *Schlueter* could not complain about an unfair hearing since he was not entitled to any hearing.

The cases of many aliens detained on Ellis Island show that the exemption from removal stated in Resolution XXVII has been ignored. Several of the detainees are married to native-born citizens, others are the fathers of

native-born minor children dependent on them for support, and still others are in such ill health that it has been deemed advisable to extend their paroles, lest they, like others before them, die while detained on Ellis Island. Others of the detainees were citizens, who were denaturalized by default judgments while imprisoned after conviction in the Bund conspiracy trial, reversed by this Court in May 1945. Having lost their citizenship without a trial, while in prison, they now, though stateless, are to be "removed" to Germany.

Not only have the provisions of Resolution XXVII been conveniently disregarded whenever it suited the Government officials, but they have also deliberately ignored the very provisions of the Presidential Proclamation 2526 respecting the treatment of alien enemies. That proclamation dated December 8, 1941 provides in part:

"All alien enemies shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by sections 23 and 24 of Title 50 of the United States Code, and as prescribed in the regulations duly promulgated by the President."

Are we to assume that reference to Sections 23 and 24 of Title 50 appear in said Presidential Proclamation solely to give lip-service to respect for law? In those days we were still being beguiled with nice words about and repeated references to the Atlantic Charter, and the better world which it would bring. We realize it is now said that there never was an Atlantic Charter. Such an assertion cannot be made about Sections 23 and 24. They were then and still are law.

VII.

The removal orders are invalid because they are based on the charge that Relators have adhered to the enemies of the United States, which charge is defined as treason by the Constitution, and requires proof by two witnesses.

The Constitution defines adherence to the enemy as treason. Treason is a breach of allegiance. Allegiance is of two kinds: that due from citizens, and that due from aliens *resident within the United States*. Allegiance is the obligation of fidelity and obedience which the individual owes to the government under which he lives, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. Every sojourner who enjoys our protection is bound to good faith toward our Government, and although an alien, he may be guilty of treason. Aliens domiciled in the United States owe a local and temporary allegiance which continues during the period of residence. As long as they continue to reside here, they owe obedience to our laws and may be punished for treason as a native-born citizen might be.

Young v. U. S., 97 U. S. 39, 62;

Carlisle v. U. S., 83 U. S. 147, 154;

Rex v. Jameson, (1896) 2 Q. B. 425, 430;

Blackstone's Commentaries, 1st Ed., Vol. I, 357;

Wm. Joyce v. Director of Public Prosecutions, Law Rep. App. Cases, Part VIII, Aug. 1946, p. 347.

The case of Wm. Joyce, better known as Lord Haw-Haw, is squarely in point. In that case the question to be decided by the Court was whether an alien domiciled in England for about 24 years owed any allegiance to England, and whether he could be guilty of treason for acts

committed outside the realm. Because it involved fundamental issues the case was appealed to the House of Lords, which held:

"... an act is treasonable if the actor owes allegiance, and not treasonable if he does not. It is a question of allegiance. Allegiance is owed ... by those who, being aliens, reside within the King's realm. ... All who were brought within the King's protection were *ad fidem regis*; all owed him allegiance. The natural born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day he comes within the realm. ... Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family or effects, during his residence here; and it ceaseth, whenever he withdraweth with his family and effects."

Petitioner as well as all the other alien enemies legally immigrated to the United States and established their domiciles here many years ago. Many are married to United States citizens, and are the parents of native-born children. Therefore they owe local allegiance to the United States. Throughout the war they were here. The removal orders state that they have "adhered" to the enemies of the United States. This is equivalent to charges that they have committed treason. Treason requires proof, which presupposes a trial, or at least a fair hearing. They have had neither.

VIII.

There is no proof before the Court nor before the Attorney General that petitioner or any of the alien enemies are dangerous.

We have represented more than one hundred alien enemies who were interned. Throughout the court proceedings the United States Attorney always informed the judges that the only question before them was whether the alien was an enemy; that it was not their province to ask for, and that the Attorney General was under no duty to submit to the Court, any proof that the alien enemy was in fact dangerous. Therefore we maintain that as respects petitioner's and all other alien enemy cases now before this Court, the words of Judge Bright in the Southern District uttered in one of these cases apply: "There is no proof before this court that this man is dangerous".

In fact many of these so-called dangerous alien enemies were voluntarily employed during wartime on railroads and in United States forests. The records of the courts show that many aliens interned as enemies were not nationals of enemy countries, but nevertheless were interned in some cases as long as 4 years; that many born in South America had been kidnapped from their homes there, brought here by force and against their will, and ordered interned as dangerous alien enemies. Court action was necessary in those cases to prove that the Attorney General was wrong, and to compel the release of those men. Even when the courts decided they were not enemies and must be released, they were again arrested on the trumped-up charge that they were "illegally" in the United States, and ordered deported to Germany, not to their home countries in South and Central America. If mistakes were made in those cases we are entitled to argue that a mistake may have been made in petitioner's case. We know that mistakes were made in other cases.

Further we are convinced that they were not always honest mistakes. We cite as proof among others the case of Walter Schneller, one of the defendants in the *Keegan Bund Conspiracy* case, who the Government admitted, and this Court said in its opinion, was not connected with the conspiracy. Yet when Schneller was released from prison on June 11, 1945, after three years imprisonment, he was immediately ordered interned by said Ennis on the alleged assumption that he might have been illegitimate and therefore did not derivatively acquire United States citizenship when his father and step-mother were naturalized. This despite the fact that the father had testified to his parenthood of the boy, and that Walter Schneller's brother, naturalized with him on the same day, had died in action in March 1945 while a member of the United States Air Forces. It was that case which convinced us that the conduct of the entire internment program was questionable. Our experience demonstrated that the removal proceedings could not stand airing in open court, and that the Attorney General had no facts on which to base his findings that these aliens were dangerous.

In the cases of those men, now stateless, who were citizens and who were denaturalized during the war, we have repeatedly brought to the attention of the Attorney General's office, and have proven in court, as well as before the Senate Judiciary Committee on July 24, 1947, in the presence of representatives of the Attorney General, that the denaturalization judgments based on Bund membership were obtained by the use of forged documents, known to the Justice Department to be forgeries when used; that in another default case "an address was made" by the Government so as to bring denaturalization proceedings in New Jersey, although the defendant's legal residence was known to the Justice Department to be in Brooklyn, N. Y. These charges have never been denied or refuted. The removal orders in those cases obviously can be en-

forced only by reason of the default denaturalization judgments fraudulently obtained.

We concede that the Government may not be wrong in every case and that there may exist valid reasons why some of these aliens should be removed. But we insist that each alien is entitled to know what the charges are, and to have fair opportunity to refute them, if he can, before he is removed.

IX.

Petitioner's right to voluntary departure has been effectively nullified by the action of the United States in asking all foreign governments not to grant him a visa.

The Alien Enemy Act grants petitioner the right of voluntary departure. The Government well knew of this legal right, but pretended it did not exist and detained petitioner until the Circuit Court of Appeals, Second, in *von Heymann v. Watkins*, 159 Fed. 2d 650, affirmed the right of voluntary departure. Appendixes A and B show that long before the *von Heymann* decision the Government circulated lists containing the name of petitioner, and 416 other resident alien enemies; among the other governments, with the request not to issue visas to them.

These facts were not known to petitioner Ludecke, nor to the other alien enemies at the time. They were discovered by us only after diligent search, because the lists had been circulated under diplomatic secrecy. Two trips to South America were necessary before we could conclusively prove the facts. The Government has never denied them. It merely contends that some of the evidentiary material which we obtained is confidential and privileged, and may not be admitted in evidence. The Government maintains it had a right to do what it did.

Therefore on the Government's own contention its acts in attempting to nullify the petitioner's right of voluntary departure present a problem of law.

We do not know whether these issues have actually been raised in the *Ludecke*, or in the *Ahrens* cases, now before this Court. The facts were put into evidence on February 19, 1948 during the hearing on the writ of habeas corpus filed on behalf of the 22 men whom we represent in the Southern District of New York. Judge Conger has not yet rendered his decision in those cases.

Even though these facts may not now be part of the record before this Court we respectfully urge that they should at this time be brought to the attention of this Court so that it may have the entire picture before it. The determination of the *Ludecke* and *Ahrens* cases will necessarily be controlling in the cases now before Judge Conger.

The testimony of alien enemy Hubert Jaegeler, who is subject to a removal order, was by stipulation made applicable to all the 22 cases in the Southern District. It shows that he called at practically all the Consulates in the New York area to apply for a visa, and was refused; and that in some Consulates he was actually shown the list containing his name, and told that as long as his name was on the list he could not obtain a visa.

In the cases of *Friedrich* and *Ida Bank*, Judge Bright, in the Southern District, held on August 5, 1947 that they had been prevented from leaving the country by the actions of the State Department, and that he could not agree that the right of voluntary departure does not either by its terms, or by implication, confer upon the petitioner the right to select the country to which he desires to go; that if his departure is to be voluntary it forbids restrictions by respondent, or those through whom he acts, that petitioner must go to Germany, Spain, or some other country in the Eastern Hemisphere.

We urge this Court to apply the same principle in petitioner's case. He, and all the other alien enemies subject to removal orders, have been prevented by the restrictions imposed by our Government from exercising their right of voluntary departure.

Conclusion.

We believe that in the foregoing discussion we have demonstrated that the war powers are subject to constitutional limitations; that the Alien Enemy Act read as a whole makes specific provisions for the protection of those alien enemies who are residents; that Congress provided for a hearing in such cases by the law of May 10, 1920, and that the Executive may not ignore the intent of Congress as thus expressed. To do otherwise amounts to practice of the very totalitarianism we have just fought, and mistakenly thought to have eliminated for all times.

The recent events in Czechoslovakia demonstrate what can happen when constitutional rights are ignored. Benes in 1945 allowed the expulsion from the country of people who had resided there for generations. They were expelled from the country and their farms and not allowed to take with them any of their belongings. Benes ignored constitutional rights and let his totalitarians do as they wished with their political opponents. Having once established the pattern the totalitarians found little opposition when it came the turn of Benes to be stripped of power and made a prisoner of the Communists. How quickly the evil seed sown in 1945 has brought forth weeds.

Lincoln's works, edited by John G. Nicolay and John Hay tell us that Lincoln warned against substituting "furious passions in lieu of the sober judgment of courts" (I, 37). Even in time of war he was "slow to adopt" extreme measures. He did so only because "the public safety" required it (VIII, 303).

Punishment for disloyalty, he noted, should never occur "without regular trials in duly constituted courts under the forms and all the substantial provisions of law and of the Constitution . . ." (VII, 281).

The last mentioned quotation is from Lincoln's veto message dealing with the confiscation act of 1862. In this passage Lincoln was dealing precisely with the 1862 equivalent of a "war-hysteria case".

How far from Lincoln's respect for constitutional rights is the situation presented by the cases now before the Court, which present the very totalitarian practices we have heretofore condemned. These practices are based on the sort of thinking Mr. Justice Jackson had reference to in his address to the American Society of International Law on April 13, 1945 when he said:

"Of course, there is a school of cynics in the law schools, at the bar and on the bench who will disagree, and many thoughtless people will see no reason why courts, just like other agencies, should not be weapons of policy. It is a current philosophy, with adherents and practitioners in this country, that law is anything that can muster the votes to get put in legislation or directive or decision and backed up with a policeman's club. Law to those of this school has no foundation in nature, no necessary harmony with the higher principles of right and wrong. They hold that authority is all that makes law, and power is all that is necessary to authority. It is charitable to assume that such advocates of power as the sole source of law do not recognize the identity of their incipient authoritarianism with that which has reached its awful climax in Europe."

We cannot do more to stress the importance of these cases than to repeat from the foregoing that the respondent apparently believes his authority is all that is

necessary, because he has the power. In the light of recent events in Europe it is not now difficult to identify such incipient authoritarianism with that which now is reaching an even more awful climax in Europe.

It is charitable to assume that those responsible for this program originally were true liberals and motivated by a desire to protect and defend democratic institutions from their political opponents. Unfortunately they, like all the rest of us, have proved all too human. Having been in office too long, and therein enjoyed absolute power their liberalism changed to totalitarianism. To them can be applied Pope's words:

"Vice is a monster of so frightful mien,
As to be hated needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace."

Since this case was tried on February 19, 1948, it is appropriate to call attention to the State Department Bulletin for February 15, 1948, featuring an article on AN INTERNATIONAL BILL OF HUMAN RIGHTS, and the eleven-page pamphlet in support of a human rights covenant issued by the Committee on International Law of the New York City Bar Association, for discussion at the meeting on March 9, 1948. The pamphlet mentions "the hideous disregard for human rights by Hitler", and "prompting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". But while these matters are being discussed, petitioner and all other alien enemies under removal orders are detained in custody because of their political views.

To persecute human beings solely because of their race, or for belonging to some association, be it of a political, religious or cultural nature, was when done by Hitler,

and will always be an act of injustice. It can never become right. Where government believes it can infringe upon this divine law pertaining to all humanity it will have to take into account that in some form or other the Divine Master Builder of this universe will drastically correct it.

Wherefore, we respectfully urge that the writ of habeas corpus herein be sustained.

Respectfully submitted,

GEORGE C. DIX and
DAVID S. KUMBLE,
Attorneys for Amici Curiae.

GEORGE C. DIX,
Of Counsel.

APPENDIX A.**Memorandum Distributed to Other Governments by Our State Department.**

7 In order to cooperate with the other American republics to secure the safety and welfare of this hemisphere, and to effectuate the principles and policies designed to that end which were adopted by the American republics at the Mexico City Conference, the Government of the United States is prepared to proceed with its program to exclude from this hemisphere dangerous enemy aliens who are presently in the United States.

The Government of the United States, acting through the Department of Justice, has given careful consideration to the cases of a large number of German nationals resident in the United States. After giving each individual an opportunity for a hearing before a board, the Attorney General has determined that 417 persons are dangerous to the public peace and safety of the United States because they have adhered to an enemy government or to the principles of government thereof, and has ordered that they be removed. It is considered that the exclusion from the hemisphere of these individuals will effectuate the purposes of Resolution VII of the Mexico City Conference. A list of the individuals is provided in Enclosure 1.

There is an additional, smaller group of aliens whom the United States desires to include in this program, consisting of German nationals sent to this country from other American republics for security internment during the war. Of the aliens originally brought here from the other republics, a high proportion—about three-fourths—have already been repatriated to Germany with their consent. Of the remaining one-fourth, those from three republics, namely Bolivia, Ecuador and El Salvador, have, upon the request of those governments, been re-

turned to those countries for disposition of their cases; 67 per cent of the rest have been released from confinement by the Government of the United States because after consideration of the information in each case, it was determined that although their internment was justified and probably necessary during hostilities they might now safely be allowed to remain in the hemisphere.

There remain in the custody of the Government of the United States a total of 51 cases from ten countries; the names of these individuals are listed in Enclosure 2. In these cases, after the most careful study of all the available evidence, and after a hearing before a board established by the Department of State, the Secretary of State, acting for the President, had concluded that the continued residence of these individuals in the Western Hemisphere would be prejudicial to the security and welfare of the Americans within the meaning of Resolution VII of the Mexico City Conference, and that accordingly, as contemplated by all the American republics, at that conference, these individuals also should be excluded from the hemisphere.

Since making the determination in these cases, the Government of the United States has received Resolution XXVI of the Inter-American Emergency Advisory Committee for Political Defense, dated April 12, 1946. This resolution, entitled, "On the Expulsion and Non-admission of Dangerous Persons," recommends uniform standards to be applied by every American republic in the conduct of its exclusion program. This Government is pleased to note that the standards which have been applied by the United States to both groups of aliens under discussion approximate closely those recommended by the Committee.

The Government of the United States desires in the near future to issue orders to the persons listed in the enclosures requiring them to depart from the United

States within a period of thirty days, and providing that if they neglect or refuse so to depart they will be removed to Germany. (This procedure is dictated by the internal laws of the United States under which this program is contemplated.) Before issuing such orders, however, the Government of the United States is desirous of receiving from the other American republics and from the Dominion of Canada assurances that the persons in question will not be permitted to enter their territory. Such assurances by your Government would be greatly appreciated by the Government of the United States as an act of cooperation in the application of Resolution VII. To effectuate these assurances, it is respectfully suggested that precise instructions be sent to the appropriate Consulates in the United States, especially those in New York, New Orleans, and San Antonio or Houston, Texas. The Department of State will gladly furnish copies of the enclosed lists to your Embassy, in Washington for distribution to the Consulates.

It will be noted that of the Germans listed in Enclosure 2, five were brought to this country from Colombia. While the Government of the United States is prepared to discuss the dangerousness of any of the individuals in whom your Government is interested, this Government is pleased to note that its Ambassador has been informed that the Government of Colombia favors the deportation to Germany of four of the five listed. For the sake of convenience and uniformity the name of the fifth individual, Herbert Schwartz, has also been included on the list. This Government is fully aware, however, of your Government's memorandum of March 25, requesting that this individual's deportation be suspended. You may be assured that no action will be taken towards deporting Schwartz without the consent of your Government.

It would be futile for the United States, or for any other American republic, to exclude a dangerous individual if that individual could proceed to another country in the

hemisphere and carry on his activities there. Obviously a program for the exclusion of dangerous persons such as was contemplated by Resolution VIII of the Mexico City Conference, can be effectively carried out only if all the American republics cooperate to that end. The Government of the United States is confident that your Government will act to insure the success of the steps my Government is taking in support of the program to which the American republics committed themselves at Mexico City.

APPENDIX B.

July 1, 1946.

Alecoa Steamship Company,
17 Battery Place,
New York City.

Sirs:

Your attention is called to certain circumstances arising in the conduct of a program in which the Government of the United States is currently engaged.

In Resolution VII of the Final Act of the Mexico City Conference of March 1945, the American republics declared their intention to exclude from the Western Hemisphere Axis nationals whose continued residence in the hemisphere would be prejudicial to the security and welfare of the Americas.

The United States Government has now determined that certain German nationals presently interned in the United States are dangerous to hemispheric or national security. (The names of these German nationals, arranged according to the country in which the individuals resided prior to his internment, will be found in the attached lists.) As a result of this determination, the Government is issuing orders directing these individuals to depart from the

United States within thirty days, and stating that if at the end of that period the alien will not have effected this departure, he will be removed to Germany.

Such orders, signed by the Secretary of State or by the Attorney General, are currently being served on the aliens involved. It is expected that immediately after the service many of the individuals listed, especially among those who previously resided in South or Central America, will apply for transportation to one of the other American republics or to Canada. Some of these aliens will undoubtedly present visas purporting to grant them permission to enter one of these countries. You are informed, however, that the Government of Canada and almost all of the governments of the other American republics have indicated that in order to further hemispheric security they will not grant visas to enemy aliens excluded by the United States, and will nullify any visas already issued to such individuals. It is important, therefore, that you exercise great care in examining visas presented by any of the aliens listed, to make certain that such documents are currently valid, and that it is the present intention of the government which issued the visa to allow the individual to enter its territory. Documents ante-dating June 1, 1946, for example, may, in many instances, prove to have been cancelled by the issuing government. In any case as to which doubt exists, the Alien Enemy Control Section of the Department of State will gladly make the inquiries necessary to determine whether the government in question will admit the individual seeking transportation.

This letter is not to be construed as a request that you deny to any individual transportation to a country which is actually willing to admit him.

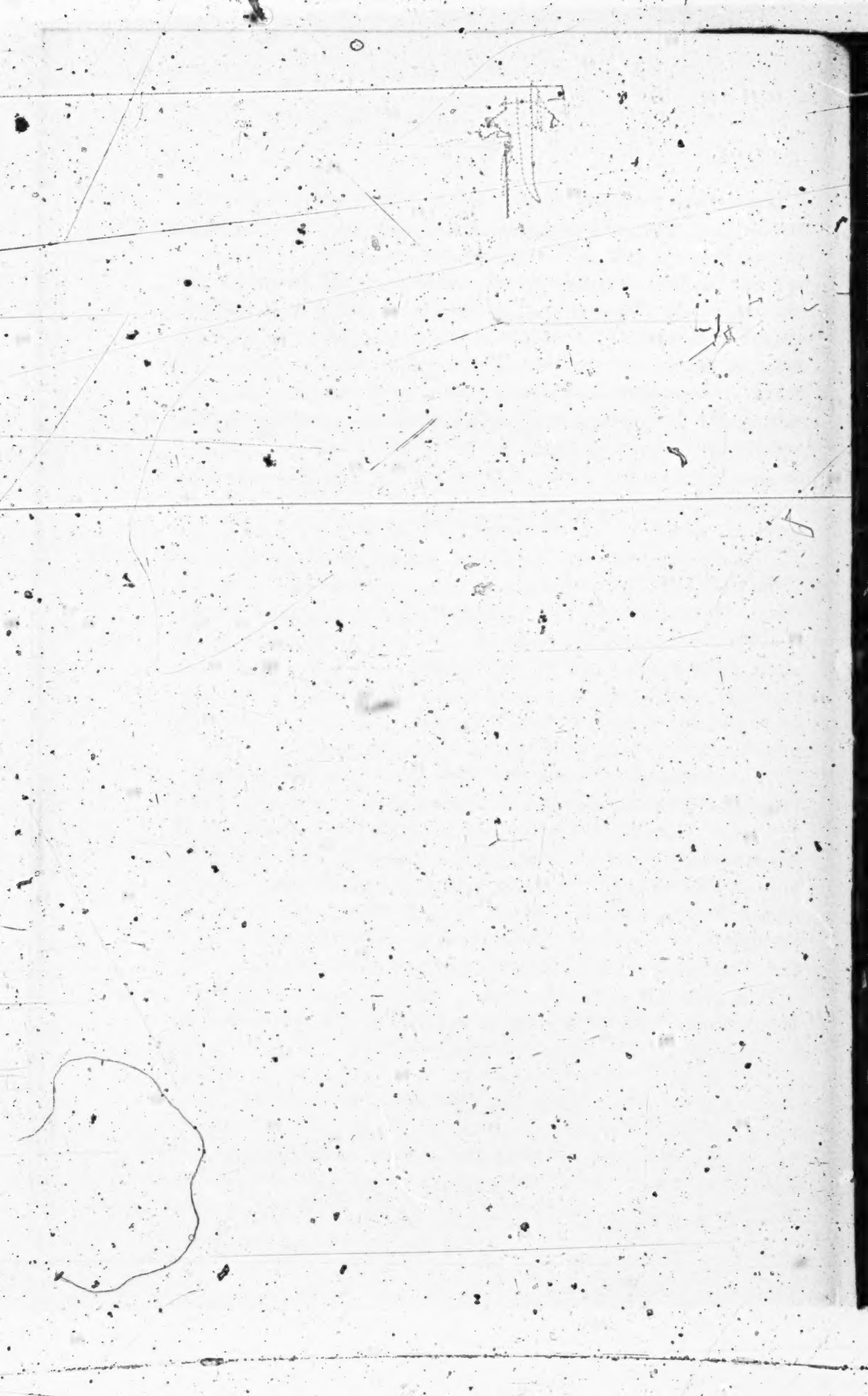
Very truly yours,

For the Secretary of State:

LOUIS HENKIN,

Acting Chief,

Alien Enemy Control Section.



SUPREME COURT OF THE UNITED STATES

No. 723.—OCTOBER TERM, 1947.

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| Kurt G. W. Ludecke, Petitioner, | On Writ of Certiorari to the United States Circuit Court of Ap- peals for the Second Circuit. |
| v. | |
| W. Frank Watkins, as District Director of Immigration. | |

[June 21, 1948.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Fifth Congress committed to the President these powers:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside

2 LUDECKE v. WATKINS.

within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." (Act of July 6, 1798, 1 Stat. 577, R. S. § 4067, as amended, 40 Stat. 531; 50 U. S. C. § 21.)

This Alien Enemy Act has remained the law of the land, virtually unchanged since 1798.¹ Throughout these one hundred and fifty years executive interpretation and decisions of lower courts have found in the Act an authority for the President which is now questioned, and the further claim is made that if what the President did comes within the Act, the Congress could not give him such power.² Obviously these are issues which properly brought this case here. 333 U. S. —.

Petitioner, a German alien enemy,³ was arrested on December 8, 1941, and, after proceedings before an Alien Enemy Hearing Board on January 16, 1942, was interned by order of the Attorney General, dated February 9,

¹ There have been a few minor changes in wording. We have duly considered these in light of an argument in the brief of the amici curiae and deem them without significance.

² We are advised that there are 530 alien enemies, ordered to depart from the United States, whose disposition awaits the outcome of this case.

³ The district court found that:

"The petitioner was born in Berlin, Germany, on February 5, 1890. He was out of Germany for most of the period of 1923 to March 1933. He returned to Germany in March 1933 and became a member of the Nazi party. Later he had some disagreements with other members and as a result he was sent to a German concentration camp, from which he escaped March 1, 1934, after being confined for over eight months. Sometime thereafter he came to this country and published a book, 'I Knew Hitler' [*The Story of a Nazi Who Escaped The Blood Purge*—'In memory of Captain Ernst Roehm and Gregor Strasser and many other Nazis who were betrayed, murdered, and traduced in their graves'], in 1937. His

1942.* Under authority of the Act of 1798, the President, on July 14, 1945, directed the removal from the United States of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States." Proclamation 2555, 10 Fed. Reg. 8947. Accordingly, the Attorney General, on January 18, 1946, ordered petitioner's removal.* Denial of a writ of *habeas corpus* for release from detention under this order was affirmed by the court below. 163 F. 2d 143.

As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes "preclude judicial review." Act of June 11, 1946, § 10, 60 Stat. 237, 243. Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt. The language employed by the Fifth Congress could hardly be made clearer, or be rendered doubtful, by the incom-

petition for naturalization as an American citizen was denied December 18, 1939."

The petitioner's attitude was thus expressed in his brief before the district court:

"Fundamentally, it matters not where I live, for I can strive to live the right life and be of service where ever I am. Besides, it may well be a better thing to do the best I can while I can in the midst of a defeated people suffering in body and soul, than to be a futile and frustrated something in the midst of a triumphant people breathing the foul air of self-complacency, hypocrisy, and self-deceit."

*No question has been raised as to the validity of these administrative actions taken pursuant to Presidential Proclamation 2526, dated December 8, 1941, 6 Fed. Reg. 6323, issued under the authority of the Alien Enemy Act.

*The order recited that the petitioner was deemed dangerous on the basis of the evidence adduced at hearings before the Alien Enemy Hearing Board on January 18, 1942, and the Repatriation Hearing Board on December 17, 1945. The district court which examined these proceedings found that petitioner had notice and a fair hearing and that the evidence was substantial. See also note 8, *infra*.

plete and not always dependable accounts we have of debates in the early years of Congress.* That such was the scope of the Act is established by controlling contemporaneous construction. "The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons," Marshall, C. J., in *Brown v. United States*, 8 Cranch 110, 126, "appears to me to be as unlimited as the legislature could make it." Washington, J., in *Lockington v. Smith*, 15 Fed. Cas. No. 8448 at p. 760. The very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion.⁷ This view was expressed by Mr. Justice Iredell shortly after the Act was passed, *Case of Fries*, 9 Fed. Cas. No. 5128, and every judge before whom the question has since come has held that the statute barred judicial review.⁸ We would so read the Act if it came before us without the impressive gloss of history.

* See, however, *United States ex rel. Kessler v. Watkins*, 163 F. 2d 140; *Citizens Protective League v. Clark*, 155 F. 2d 290.

⁷ "Such a construction would, in my opinion, be at variance with the spirit as well as the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge. . . . I do not feel myself authorised to impose limits to the authority of the executive magistrate which congress, in the exercise of its constitutional powers, has not seen fit to impose. Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter, the rule of its decisions." *Lockington v. Smith*, *supra*, at p. 761.

⁸ *Citizen's Protective League v. Clark*, 155 F. 2d 290; *United States ex rel. Schluster v. Watkins*, 158 F. 2d 853; *United States ex rel. Hack v. Clark*, 159 F. 2d 552; *United States ex rel. Kessler*

The power with which Congress vested the President had to be executed by him through others. He provided for the removal of such enemy aliens as were "deemed by the Attorney General" to be dangerous.* But such a finding, at the President's behest, was likewise not to be subjected to the scrutiny of courts. For one thing, removal was contingent not upon a finding that in fact an alien was "dangerous." The President was careful to call for the removal of aliens "deemed by the Attorney General to be dangerous."† But the short answer is that the Attorney General was the President's voice and conscience. A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that

v. Watkins, 163 F. 2d 140; *United States ex rel. Von Ascheberg v. Watkins*, 163 F. 2d 1021; *Minotto v. Bradley*, 252 F. 600; see *Lockington's Case*, *Brightly* (Pa.) 269, 280; *Lockington v. Smith*, 15 F. Cas. No. 8448, at p. 758; *Ex parte Gruber*, 247 F. 882; *De Lacey v. United States*, 249 F. 625; *Ex parte Franklin*, 253 F. 984; *Grahl v. United States*, 261 F. 487; cf. *Banning v. Penrose*, 255 F. 159; *Ex parte Riise*, 257 F. 102; *Ex parte Gilroy*, 257 F. 110; *United States ex rel. Di Cicco v. Longo*, 46 F. Supp. 170; *United States ex rel. Schwarzkopf v. Uhl*, 137 F. 2d 908; *United States ex rel. D'Esquivia v. Uhl*, 137 F. 2d 903; *United States ex rel. Knauer v. Jordan*, 158 F. 2d 337. The one exception is the initial view taken by the district court in this case. It rejected the "contention that the only question that the Court may consider in this habeas corpus proceeding is the petitioner's alien enemy status, although there are cases which give support to that view," but held the petitioner had had a fair hearing before the Repatriation Board and that there was substantial evidence to support the Attorney General's determination that petitioner was "dangerous." On rehearing, the court noted that the *Schluster* case, *supra*, foreclosed the issue.

* If the President had not added this express qualification, but had conformed his proclamation to the statutory language, presumably the Attorney General would not have acted arbitrarily but would have utilized some such implied standard as "dangerous" in his exercise of the delegated power.

power exercised within narrower limits than Congress authorized.

And so we reach the claim that while the President had summary power under the Act, it did not survive cessation of actual hostilities.¹⁰ This claim in effect nullifies the power to deport alien enemies, for such deportations are hardly practicable during the pendency of what is colloquially known as the shooting war.¹¹ Nor does law

¹⁰ "The cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton v. Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161, that the war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues during that emergency. *Stewart v. Kahn*, 11 Wall. 493, 507. Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. No more is involved here." *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116.

¹¹ The claim is said to be supported by the legislative history of the Act. We do not believe that the paraphrased expressions of a few members of the Fifth Congress could properly sanction at this late date a judicial reading of the statutory phrase "declared war" to mean "state of actual hostilities." See p. 3, *supra*. Nothing needs to be added to the consideration which this point received from the court below in the *Kessler* case. Circuit Judge Augustus Hand, in this case speaking for himself and Circuit Judges L. Hand and Swan, said:

"Appellants' counsel argues that the Congressional debates preceding the enactment of the Alien Law of 1798 by Gallatin, Otis and others, show that Congress intended that 'war' as used in the Alien Enemy Act should be war in fact. We cannot agree that the discussions had such an effect. Gallatin argued that Section 9 of Art. I of the Constitution allowing to the states the free 'Migration or Importation' of aliens until 1808 might stand in the way of the Act as proposed if it was not limited to a 'state of actual hostilities.' It however was not so limited in the text of the act and it is hard to see how the failure to limit it in words indicated a disposition on the part of Congress to limit it by implication. Otis objected to limiting the exercise of the power to a state of declared war because he thought that the President should have power to deal with enemy aliens in the case of hostilities short of war and in cases where a war was not declared. That Otis wished to add 'hostilities' to the words

lag behind common sense. War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops." See *United States v. Ander-*

'declared war,' and failed in his attempt, does not show that Congress meant that when war was declared active hostilities must exist in order to justify the exercise of the power. The questions raised which were dealt with in the act as finally passed were not how long the power should last when properly invoked, but the conditions upon which it might be invoked. Those conditions were fully met in the present case and no question is raised by appellants' counsel as to the propriety of the President's Proclamation of War. There is no indication in the debates or in the terms of the statute that the exercise of the power, when properly invoked, should cease until peace was made, and peace has not been made in the present case. If the construction of the statute contended for by appellants' counsel were adopted, the Executive would be powerless to carry out internment or deportation which was not exercised during active war and might be obliged to leave the country unprotected from aliens dangerous either because of secrets which they possessed or because of potential inimical activities. It seems quite necessary to suppose that the President could not carry out prior to the official termination of the declared state of war, deportations which the Executive regarded as necessary for the safety of the country but which could not be carried out during active warfare because of the danger to the aliens themselves or the interference with the effective conduct of military operations." (*United States ex rel. Kessler v. Watkins*, 163 F. 2d at 142-43.)

¹² It is suggested that a joint letter to the Chairman of a congressional committee by Attorney General Gregory and the Secretary of Labor in the Wilson administration reflects a contrary interpretation of this Act. But, as the *Kessler* opinion pointed out: "The letter of Attorney General Gregory referred to by appellants' counsel does not affect our conclusions. When he said that there was no law to exclude aliens he was, in our opinion, plainly referring to conditions after the ratification of the peace treaty, and not to prior conditions."

Ibid. The text of the letter (dated Feb. 5, 1919) supports that observation: "There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty. Unless the bill introduced by you, or one similar in char-

son, 9 Wall. 56, 70; The Protector, 12 Wall. 700; *McElrath v. United States*, 102 U. S. 426, 438; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 167. "The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act.¹² *Ibid.* Whether and when

acted, is passed it will become necessary on the ratification of peace to set free all of these highly dangerous persons." Hearings before the House Committee on Immigration and Naturalization on H. R. 6750, 66th Cong., 1st Sess., 42-43. And Attorney General Palmer made substantially the same statements to the Senate and House Committees on Immigration. See S. Rep. No. 283, 66th Cong., 1st Sess., 2; H. R. Rep. No. 143, 66th Cong., 1st Sess., 2.

But even if contradictory views were expressed by Attorney General Gregory, they plainly reflect political exigencies which from time to time guide the desire of an administration to secure what in effect is confirming legislation. The confusion of views is strikingly manifested by Attorney General Gregory's recognition that the Act survived the cessation of actual hostilities so as to give authority to apprehend, restrain, and secure enemy aliens. See, generally, World War I cases cited note 8, *supra*. In any event, even if one view expressed by Attorney General Gregory, as against another expressed by him, could be claimed to indicate a deviation from an otherwise uniformly accepted construction of the Act before us, it would hardly touch the true meaning of the statute. *United States ex rel. Hirschberg v. Malanaphy*, opinion denying petition for rehearing, United States Circuit Court of Appeals for the Second Circuit, June 2, 1948 (not yet reported). As against the conflicting views of one Attorney General we have not only the view but the actions of the present Attorney General and of the President and their ratification by the present Congress. See note 19, *infra*.

¹² Of course, there are statutes which have provisions fixing the date of the expiration of the war powers they confer upon the Executive. See, e. g., *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 167, n. 1 (collection of statutes providing that the authority terminates upon ratification of treaty of peace or by Presidential proclamation). Congress can, of course, provide either by a day certain or a defined event for the expiration of a statute. But when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.

it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled. Only a few months ago the Court rejected the contention that the state of war in relation to which the President has exercised the authority now challenged was terminated. *Woods v. Miller Co.*, 333 U. S. 138. Nothing that has happened since calls for a qualification of that view.¹⁴ It is still true, as was said in the opinion in that case which eyed the war power most jealously, "We have armies abroad exerting our war power and have made no peace terms with our allies, not to mention our principal enemies." *Woods v. Miller Co.*, *supra*, at p. 147 (concurring opinion). The situation today is strikingly similar to that of 1919, where this Court observed: "In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid." *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. at 163.

The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that "a state of war still exists."

¹⁴ Cf., e. g., the President's address to Congress on March 17, 1948, recommending the enactment of the European recovery program, universal military training, and the temporary reenactment of selective service legislation. H. Doc. No. 569, 80th Cong., 2d Sess. On May 10, 1948, by Executive Order 9957, 13 Fed. Reg. 2503, the President exercised his authority "in time of war, . . . through the Secretary of War, to take possession and assume control of any system or systems of transportation . . ." (Act of August 29, 1916, 39 Stat. 619, 645, 10 U. S. C. § 1361.)

Presidential Proclamation 2714, 12 Fed. Reg. 1; see *Woods v. Miller Co.*, *supra*, at p. 140; *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116. The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.¹⁸ These are matters of political judgment for which judges have neither technical competence nor official responsibility.

This brings us to the final question. Is the statute valid as we have construed it? The same considerations of reason, authority, and history, that led us to reject reading the statutory language "declared war"¹⁹ to mean "actual hostilities," support the validity of the statute. The war power is the war power. If the war, as we have held, has not in fact ended, so as to justify local rent control, *a fortiori*, it validly supports the power given to the President by the Act of 1798 in relation to alien enemies. Nor does it require protracted argument to find no defect in the Act because resort to the courts may

¹⁸ "Rapid changes are taking place in Europe which affect our foreign policy and our national security. . . . Almost 3 years have passed since the end of the greatest of all wars, but peace and stability have not returned to the world." H. Doc. No. 569, *supra*, at p. 1.

¹⁹ We should point out that it is conceded that a "state of war" was "formally declared" against Germany. Act of December 11, 1941, 55 Stat. 796.

be had only to challenge the construction and validity of the statute and to question the existence of the "declared war," as has been done in this case." The Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights.¹⁸ The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor

¹⁸ The additional question as to whether the person restrained is in fact an alien enemy fourteen years of age or older may also be reviewed by the courts. See cases cited note 8, *supra*. This question is not raised in this case.

¹⁹ The Fifth Congress was also responsible for "An Act concerning Aliens," approved June 25, 1798, 1 Stat. 570, and "An Act in addition to the act, entitled 'An act for the punishment of certain crimes against the United States,'" approved July 14, 1798, 1 Stat. 596, as well as the instant "An Act respecting Alien Enemies," approved July 6, 1798. It is significant that while the former statutes—the Alien and Sedition Acts—were vigorously and contemporaneously attacked as unconstitutional, there was never any issue raised as to the validity of the Alien Enemy Act. James Madison, in his report on the Virginia Resolutions, carefully and caustically differentiated between friendly and enemy alien legislation, as follows: "The next observation to be made is, that much confusion and fallacy have been thrown into the question by blending the two cases of *aliens, members of a hostile nation*, and *aliens, members of friendly nations*. . . . With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies." 6 Writings of James Madison (Hunt, Editor) 360-61. Similarly, Thomas Jefferson, the author of the Kentucky Resolutions of 1798 and 1799, was careful to point out that the Alien Act under attack was the one "which assumes power over alien friends." 8 Writings of Thomas Jefferson (Ford, Editor) 466. There was never any questioning of the Alien Enemy Act of 1798 by either Jefferson or Madison nor did either ever suggest its repeal.

bespeak denial of due process to withhold such power from the courts.

Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined. In relation to the distribution of constitutional powers among the three branches of the Government, the optimistic Eighteenth Century language of Mr. Justice Iredell, speaking of this very Act, is still pertinent:

"All systems of government suppose they are to be administred by men of common sense and common honesty. In our country, as all ultimately depends on the voice of the people, they have it in their power, and it is to be presumed they generally will choose men of their description; but if they will not, the case, to be sure, is without remedy. If they choose fools, they will have foolish laws. If they choose knaves, they will have knavish ones. But this can never be the case until they are generally fools or knaves themselves, which, thank God, is not likely ever to become the character of the American people." (*Case of Fries, supra*, at p. 836.)

Accordingly, we hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President of the United States. The Founders in their wisdom made him not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs. He who was entrusted with such vast powers in relation to the outside world was also entrusted by Congress, almost throughout the whole life of the nation, with the

disposition of alien enemies during a state of war. Such a page of history is worth more than a volume of rhetoric.¹⁹

Judgment affirmed and stay order entered February 2, 1948, vacated.

¹⁹ It is suggested that Congress ought to do something about correcting today's decision. But the present Congress has apparently anticipated the decision. It has recognized that the President's powers under the Alien Enemy Act of 1798 were not terminated by the cessation of actual hostilities by appropriating funds "... for all necessary expenses incident to the maintenance, care, detention, surveillance, parole, and transportation of alien enemies and their wives and dependent children, including transportation and other expenses in the return of such persons to place of bona fide residence or to such other place as may be authorized by the Attorney General" Pub. L. 166, 80th Cong., 1st Sess., approved July 9, 1947, 61 Stat. —, —. "And the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive. *Brooks v. Dewar*, 313 U. S. 354, 361." *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116; see also *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139.

SUPREME COURT OF THE UNITED STATES

No. 723.—OCTOBER TERM, 1947.

Kurt G. W. Ludecke, Petitioner,
v.
W. Frank Watkins, as District
Director of Immigration.

On Writ of Certiorari
to the United States
Circuit Court of Ap-
peals for the Second
Circuit.

[June 21, 1948.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join, dissenting.

The petition for habeas corpus in this case alleged that petitioner, a legally admitted resident of the United States, was about to be deported from this country to Germany as a "dangerous" alien enemy, without having been afforded notice and a fair hearing to determine whether he was "dangerous." The Court now holds, as the Government argued, that because of a presidential proclamation, petitioner can be deported by the Attorney General's order without any judicial inquiry whatever into the truth of his allegations.¹ The Court goes further and holds, as I

¹ The Court specifically holds that this petitioner is not entitled to have this Court or any other court determine whether petitioner has had a fair hearing. The merits of the Attorney General's action are therefore not subject to challenge by the petitioner. Nevertheless the Court in note 3 quotes out of context a short paragraph from a written protest made by petitioner against the Attorney General's procedure. The only possible purpose of this quotation is to indicate that, anyhow, the petitioner ought to be deported because of his views stated in this paragraph of his protest against the Attorney General's procedure. This is a strange kind of due process. The protest pointed out that Hitler had kept petitioner in a concentration camp for eight months for disloyalty to the Nazis and that this Government had then kept him imprisoned for four years on the charge that he

understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General's deportation order. MR. JUSTICE DOUGLAS has given reasons in his dissenting opinion why he believes that deportation of aliens, without notice and hearing, whether in peace or war, would be a denial of due process of law. I agree with MR. JUSTICE DOUGLAS for many of the reasons he gives that deportation of petitioner without a fair hearing as determined by judicial review is a denial of due process of law.² But I do not reach the question of power to deport aliens of countries with which we are at war while we are at war, because I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign

was a Nazi. Immediately before the paragraph cited in the Court's opinion, petitioner's protest contained the following statement:

"Far be it from me, however, to thrust my goodwill upon anybody and insist to stay on a community whose public servants of ill will seek to remove me by pitiful procedures and illegal means. Therefore, I propose that I leave voluntarily as a free man, not as a dangerous alien deportee, at the earliest opportunity provided I shall be allowed sixty days to settle my affairs before sailing date."

Is it due judicial process to refuse to review the whole record to determine whether there was a fair hearing and yet attempt to bolster the Attorney General's deportation order by reference to two sentences in a long record?

² Compare *Ex parte Endo*, 323 U. S. 283; *Korematsu v. United States*, 323 U. S. 214.

country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported.

The Court relies on the Alien Enemy Act of 1798. 1 Stat. 577, 50 U. S. C. § 21-24. That Act did grant extraordinarily broad powers to the President to restrain and "to provide for the removal" of aliens who owe allegiance to a foreign government, but such action is authorized only "whenever there is a declared war between the United States" and such foreign government, or in the event that foreign government attempts or threatens the United States with "any invasion or predatory incursion." The powers given to the President by this statute, I may assume for my purposes, are sufficiently broad to have authorized the President acting through the Attorney General to deport alien Germans from this country while the "declared" second World War was actually going on, or while there was real danger of invasion from Germany. But this 1798 statute, unlike statutes passed in later years, did not expressly prescribe the events which would for statutory purposes mark the termination of the "declared" war or threatened invasions. See *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 165, n. 1. In such cases we are called on to interpret a statute as best we can so as to carry out the purpose of Congress in connection with the particular right the statute was intended to protect. *United States v. Anderson*, 9 Wall. 56, 69-70; *The Protector*, 12 Wall. 700, 702, or the particular evil the statute was intended to guard against. *McElrath v. United States*, 102 U. S. 426, 437, 438. See *Judicial Determination of the End of the War*, 47 Col. L. Rev. 255.

LUDECKE v. UNITED STATES.

The 1798 Act was passed at a time when there was widespread hostility to France on the part of certain groups in the United States. It was asserted by many that France had infiltrated this country with spies preaching "subversive" ideas and activities. Mr. Otis, the chief congressional spokesman for the measure, expressed his fears of "... a band of spies ... spread through the country from one end of it to the other who in case of the introduction of an enemy into our country" might join the enemy "in their attack upon us, and in their plunder of our property" *Annals of Congress*, 5th Cong., 2d Sess. 1791. Congressional discussions of this particular measure appear at pp. 1573-1582, 1785-1796, and 2034-2035, *Annals of Congress*, 5th Cong., 2d Sess., and show beyond any reasonable doubt that the Alien Enemy Act of 1798 was intended to grant its extraordinary powers only to prevent alien enemies residing in the United States from extending aid and comfort to an enemy country while dangers from actual fighting hostilities were imminently threatened. Indeed, Mr. Otis, who was most persistent in his expressions of anti-French sentiments and in his aggressive sponsorship of this and its companion Alien and Sedition Acts, is recorded as saying "... that in a time of tranquility, he should not desire to put a power like this into the hands of the Executive; but, in a time of war, the citizens of France ought to be considered and treated and watched in a very different manner from citizens of our own country." *Annals of Congress*, 5th Cong., 2d Sess. 1791. And just before the

* In addition to the above discussions of the Alien Enemy Act, frequent references to the Act were made in the congressional debates on the Alien Act, 1 Stat. 570, and the Sedition Act, 1 Stat. 596, both of which were passed within two weeks of the adoption of the Alien Enemy Act. These references appear in many places in the *Annals of Congress*, 5th Cong., 2d Sess. See e. g., 1973-2023.

bill was ordered to be read for its third time, Mr. Galatin pointed out that the Alien Act had already made it possible for the President to remove all aliens, whether friends or enemies; he interpreted the measure here under consideration, aimed only at alien enemies, as providing "in what manner they may be laid under certain restraints by way of security." For this reason he supported this bill. *Annals of Congress*, 5th Cong., 2d Sess. 2035.

German aliens could not now, if they would, aid the German Government in war hostilities against the United States. For as declared by the United States Department of State, June 5, 1945, the German armed forces on land and sea had been completely subjugated and had unconditionally surrendered. "There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers." And the State Department went on to declare that the United States, Russia, Great Britain, and France had assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal, or local government or authority." 12 State Dept. Bull. 1051. And on March 17, 1948, the President of the United States told the Congress that "Almost three years have passed since the end . . ." of the war with Germany. See Court opinion, n. 15.

Of course it is nothing but a fiction to say that we are now at war with Germany.* Whatever else that

*The Court cites *Woods v. Miller Co.*, 333 U. S. 138, as having held that the war with Germany has not yet terminated. I find no such holding in the opinion and no language that even suggests such a holding. We there dealt with the constitutional war powers of Congress, whether all those powers are necessarily non-existent

fiction might support, I refuse to agree that it affords a basis for today's holding that our laws authorize the peacetime banishment of any person on the judicially unreviewable conclusion of a single individual. The 1798 Act did not grant its extraordinary and dangerous powers to be used during the period of fictional wars. As previously pointed out, even Mr. Otis, with all of his fervent support of anti-French legislation, repudiated the suggestion that the Act would vest the President with such dangerous powers in peacetime. Consequently, the Court today gives the 1798 Act a far broader meaning than it was given by one of the most vociferous champions of the 1798 series of anti-alien and anti-sedition laws.

Furthermore, the holding today represents an entirely new interpretation of the 1798 Act. For nearly 150 years after the 1798 Act there never came to this Court any case in which the Government asked that the Act be interpreted so as to allow the President or any other person to deport alien enemies without allowing them access to the courts. In fact, less than two months after the end of the actual fighting in the first World War, Attorney General Gregory informed the Congress that, although there was power to continue the internment of alien enemies after the cessation of actual hostilities and until the ratification of a peace treaty, still there was no statute under which they could then be deported.* For this reason the Attorney General re-

when there are no actual hostilities. Decision of that question has hardly even a remote relevancy to the meaning of the 1798 Alien Enemy Act. The Court today also seeks to support its judgment by a quotation from a concurring opinion in the *Woods* case, *supra*. But the concurring opinion cited was that of a single member of the Court.

* In a letter addressed to the Chairman of the House Committee on Immigration and Naturalization dated January 9, 1919, Attorney General Gregory explained that a number of German subjects who

requested Congress to enact new legislation to authorize deportation of enemy aliens at that time. The bill thereafter introduced was endorsed by both the Attorney General and the Secretary of Labor in a joint letter in which they asked that it be given "immediate consideration" in view of the "gravity of this situation." Hearings before the House Committee on Immigration and Naturalization on H. R. 6750, 66th Cong., 1st Sess. 42-43. Several months later Attorney General Palmer submitted substantially the same statements to the House and Senate Committees on Immigration. H. R. Rep. 143, 66th Cong., 1st Sess. 2; S. Rep. 283, 66th Cong., 1st Sess. 2. See also Report of the Attorney General, 1919, 25-28.

A bill to carry out the recommendations of the Wilson administration was later passed, 41 Stat. 593 (1920), but not until it had been amended on the floor of the House of Representatives to require that all alien enemies be

had "been interned pursuant to section 4067 of the Revised Statutes" [section 1 of the Alien Enemy Act of 1798], were still held in custody. He then stated:

"The authority given by the President to regulate the conduct of enemy aliens during the existence of the war, in my opinion, could not properly be used at this time to bring about the deportation of these aliens. There is now, therefore, no law under which these persons can be expelled from the country nor, if once out of it, prevented from returning to this country. I have, therefore, caused to be prepared the inclosed draft of a proposed bill, the provisions of which are self-explanatory." (Italics added.) H. Rep. No. 1000, 65th Cong., 3d Sess. 1-2. This position of the Attorney General that there then was no power under existing law to deport enemy aliens was reiterated by representatives of the Attorney General in hearings before the House Committee on Immigration and Naturalization on the bill enacted into law. Hearings on H. R. 6750, 66th Cong., 1st Sess. 3-21. In conformity with this interpretation of the 1798 Alien Enemy Act the Wilson administration did not attempt to deport interned alien enemies under the 1798 Act after the Armistice and before Congress by statute expressly authorized such deportations as requested by the two Attorney Generals. Report of the Attorney General 1919, 25-28.

given a fair hearing before their deportation. 58 Cong. Rec. 3366. That a fair hearing was the command of Congress is not only shown by the language of the Act but by the text of the congressional hearings, by the committee reports and by congressional debates on the bill. In fact, the House was assured by the ranking member of the Committee reporting the bill that in hearings to deport alien enemies under the bill "a man is entitled to have counsel present, entitled to subpoena witnesses and summon them before him and have a full hearing, at which the stenographer's minutes must be taken." 58 Cong. Rec. 3373. See also 3367 and 3372. Congress therefore after the fighting war was over authorized the deportation of interned alien enemies only if they were "given a full hearing, as in all cases of deportation under existing laws." H. R. No. 143, 66th Cong., 1st Sess. 2.

This petitioner is in precisely the same status as were the interned alien enemies of the first World War for whom Congress specifically required a fair hearing with court review as a prerequisite to their deportation. Yet the Court today sanctions a procedure whereby petitioner is to be deported without any determination of his charge that he has been denied a fair hearing. The Court can reach such a result only by rejecting the interpretation of the 1798 Act given by two Attorney Generals, upon which Congress acted in 1920. It is held that Congress and the two Attorney Generals of the Wilson administration were wrong in believing that the 1798 Act did not authorize deportation of interned enemy aliens after hostilities and before a peace treaty. And in making its novel interpretation of the 1798 Act the Court today denies this petitioner and others the kind of fair hearing that due process of law was intended to guarantee. See *The Japanese Immigrant Case*, 189 U. S. 86, 100-101, read and explained on the floor of the House of Repre-

sentatives at 58 Cong. Rec. 3373, read into the House Committee hearings, *supra* at 19-20, and quoted in part in note 2 of MR. JUSTICE DOUGLAS' dissenting opinion.

The Court's opinion seems to fear that Germans if now left in the United States might somehow "have a potency for mischief" even after the complete subjugation and surrender of Germany, at least so long as the "peace of Peace has not come." This "potency for mischief" can of course have no possible relation to apprehension of any invasion by or war with Germany. The apprehension must therefore be based on fear that Germans now residing in the United States might emit ideas dangerous to the "peace of Peace." But the First Amendment represents this nation's belief that the spread of political ideas must not be suppressed. And the avowed purpose of the Alien Enemy Act was not to stifle the spread of ideas after hostilities had ended.* Others in

* As a justification for its interpretation of the 1798 Act the Court appears to adopt the reasons advanced by the Second Circuit Court of Appeals in *United States ex rel. Kessler v. Watkins*, 163 F. 2d 140, decided in 1947. That Court emphasized the difficulty of deportation of alien enemies during the time of actual hostility "because of the danger to the aliens themselves or the interference with the effective conduct of military operations." This reasoning would of course be persuasive if the object of the 1798 statute had been punishment of the alien enemies, but the whole legislative history shows that such was not the purpose of the Act. Hence the Act cannot be construed to authorize the deportation of an enemy alien after the war is over as punishment. Furthermore, the purpose of deportation, so far as it was authorized (if authorized) under the 1798 Act, was not to protect the United States from ideas of aliens after a war or threatened invasion but to protect the United States against sabotage, etc., during a war or threatened invasion. Nevertheless, the Circuit Court of Appeals thought that without its interpretation "the Executive would be powerless to carry out internment or deportation which was not exercised during active war and might be obliged to leave the country unprotected from aliens dangerous either because of secrets which

the series of Alien and Sedition Acts did provide for prison punishment of people who had or at least who dared to express political ideas. I cannot now agree to an interpretation of the Alien Enemy Act which gives a new life to the long repudiated anti-free speech and anti-free press philosophy of the 1798 Alien and Sedition Acts. I would not disinter that philosophy which the people have long hoped Thomas Jefferson had permanently buried when he pardoned the last person convicted for violation of the Alien and Sedition Acts.

Finally, I wish to call attention to what was said by Circuit Judge Augustus Hand in this case speaking for himself and Circuit Judges Learned Hand and Swan, before whom petitioner argued his own cause. Believing the deportation order before them was not subject to judicial review, they saw no reason for discussing the "... nature or weight of the evidence before the Repatriation Hearing Board, or the finding of the Attorney General" But they added: "However, on the face of the record it is hard to see why the relator should now

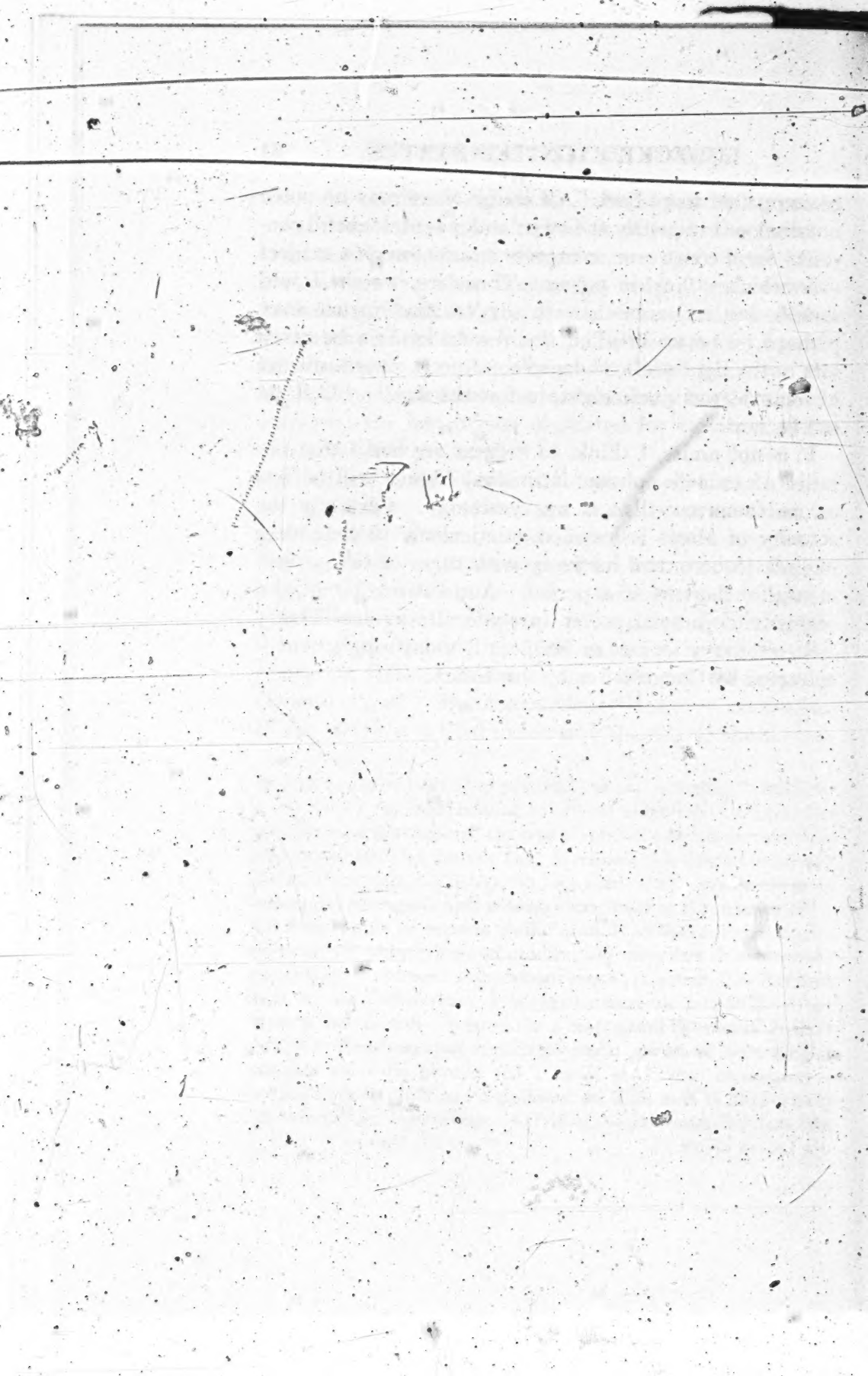
they possessed or because of potential inimical activities." But after a war is over the only "inimical activities" would relate to peacetime governmental matters—not the type of conduct which concerned those who passed the Alien Enemy Act. Moreover, it is difficult to see why it would endanger this country to keep aliens here "because of secrets which they possess." And of course the executive is not powerless to send dangerous aliens out of this country, even if the 1798 Act does not authorize their deportation, for there are other statutes which give broad powers to deport aliens. There is this disadvantage to the Government, however, in connection with the other deportation statutes—they require a hearing and the executive would not have arbitrary power to send them away with or without reasons.

⁷ See Bowers, Jefferson and Hamilton, 1925, c. XVI, "Hysterics," and c. XVII, "The Reign of Terror"; 1 Morison, Life of Otis, c. VIII, "A System of Terror."

be compelled to go back. Of course there may be much not disclosed to justify the step; and it is of doubtful propriety for a court ever to express an opinion on a subject over which it has no power. Therefore, we shall, and should, say no more than to suggest that justice may perhaps be better satisfied if a reconsideration be given him in the light of the changed conditions, since the order of removal was made eighteen months ago." 163 F. 2d at 144.

It is not amiss, I think, to suggest my belief that because of today's opinion individual liberty will be less secure tomorrow than it was yesterday. Certainly the security of aliens is lessened, particularly if their ideas happen to be out of harmony with those of the governmental authorities of a period. And there is removed a segment of judicial power to protect individual liberty from arbitrary action, at least until today's judgment is corrected by Congress,* or by this Court.

* It is suggested in the Court's opinion that Congress by appropriating funds in 1947 to "return" alien enemies to their "bona fide residence or to such other place as may be authorized by the Attorney General" has already approved the Attorney General's interpretation of the 1798 Act as authorizing the present deportation of alien enemies without affording them a fair hearing. But no such strained inference can be drawn. Congress did not there or elsewhere express a purpose to deny these aliens a fair hearing after the war was over. Until it does so, I am unwilling to attribute to the Congress any such attempted violation of the constitutional requirement for due process of law.



SUPREME COURT OF THE UNITED STATES

No. 723.—OCTOBER TERM, 1947.

Kurt G. W. Ludecke, Petitioner,

v.

W. Frank Watkins, as District
Director of Immigration.

On Writ of Certiorari
to the United States
Circuit Court of Ap-
peals for the Second
Circuit.

[June 21, 1948.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE, concur, dissenting.

I do not agree that the sole question open on *habeas corpus* is whether the petitioner is in fact an alien enemy.¹ That delimitation of the historic writ is a wholly arbitrary one. I see no reason for a more narrow range of judicial inquiry here than in *habeas corpus* arising out of any other deportation proceeding.

It is undisputed that in peacetime an alien is protected by the due process clause of the Fifth Amendment. *Wong Wing v. United States*, 163 U. S. 228. Federal courts will then determine through *habeas corpus* whether or not a deportation order is based upon procedures affording due process of law. *Vajtauer v. Commissioner*, 273 U. S. 103, 106. In deportation proceedings due process requires reasonable notice (*Tisi v. Tod*, 264 U. S. 131, 134), a fair hearing (*Bridges v. Wixon*, 326 U. S. 135, 156;

¹ See *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, aff'd 158 F. 2d 853; *United States v. Longo*, 46 F. Supp. 170; *United States v. Uhl*, 46 F. Supp. 688, rev'd on other grounds, 137 F. 2d 858; *Ex parte Gilroy*, 257 F. 110; *Banning v. Penrose*, 255 F. 159; *Ex parte Franklin*, 253 F. 984; *Minotto v. Bradley*, 252 F. 600. Cf. *Citizens Protective League v. Clark*, 155 F. 2d 290; *DeLacey v. United States*, 249 F. 625. In the *Schlueter* case it was held that the Constitution and the statute do not require a hearing and thus an alien enemy cannot complain of the character of the hearing he did receive. 67 F. Supp. at 565.

Chin Yow v. United States, 208 U. S. 8, 12; *Low Wah Suey v. Backus*, 225 U. S. 460), and an order supported by some evidence (*Vajtauer v. Commissioner*, *supra*, p. 106; *Zakonaite v. Wolf*, 226 U. S. 272, 274). And see *Kwock Jan Fat v. White*, 253 U. S. 454.

The rule of those cases is not restricted to instances where Congress itself has provided for a hearing. *The Japanese Immigrant Case*, 189 U. S. 86, decided in 1903, so held. The Court in that case held that due process required that deportation be had only after notice and hearing even though there, as here, the statute prescribed no such procedure but entrusted the matter wholly to an executive officer.² Consistently with that principle we held in *Bridges v. Wixon*, *supra*, that a violation of the rules governing the hearing could be reached on *habeas corpus*, even though the rules were prescribed not by Congress but by the administrative agency in charge of the deportation proceeding. We stated, p. 154,

"We are dealing here with procedural requirements prescribed for the protection of the alien. Though

² The Court said, 189 U. S. p. 101: "... no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognised."

deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

The same principles are applicable here. The President has classified alien enemies by regulations of general applicability and has authorized deportation only of those deemed dangerous because they have adhered to an enemy government, or the principles thereof. Petitioner was in fact given a hearing in 1945 before the Repatriation Hearing Board in addition to one in 1942 before the Alien Enemy Hearing Board. The order for his deportation recites that "upon consideration of the evidence presented" before those Boards, the Attorney General, in the words of the Proclamation, deems petitioner "to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principle thereof." These findings and conclusions and the procedure by which they were reached must conform with the requirements of due process. And *habeas corpus* is the time-honored procedure to put them to the test.

The inquiry in this type of case need be no greater an intrusion in the affairs of the Executive branch of government than inquiries by *habeas corpus* in times of peace into a determination that the alien is considered to be an "undesirable resident of the United States." See *Mahler v. Eby*, 264 U. S. 32. Both involve only a determination that procedural due process is satisfied, that

there be a fair hearing, and that the order be based upon some evidence.

The needs of the hour may well require summary apprehension and detention of alien enemies. A nation at war need not be detained by time-consuming procedures while the enemy bores from within. But with an alien enemy behind bars, that danger has passed. If he is to be deported only after a hearing, our constitutional requirements are that the hearing be a fair one. It is foreign to our thought to defend a mock hearing on the ground that in any event it was a mere gratuity. Hearings that are arbitrary and unfair are no hearings at all under our system of government. Against them *habeas corpus* provides in this case the only protection.

The notion that the discretion of any officer of government can override due process is foreign to our system. Due process does not perish when war comes. It is well established that the war power does not remove constitutional limitations safeguarding essential liberties. *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 426.

